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# Broadcasting Policy and Copyright Law

An Analysis of a Cable Rediffusion Right

Robert E. Babe and Conrad Winn



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# BROADCASTING POLICY AND COPYRIGHT LAW

An Analysis of a Cable Rediffusion Right

Robert E. Babe  
and  
Conrad Winn

## AUTHORS

**Robert E. Babe** is a consulting economist based in Ottawa who has specialized in the Canadian communications industries. He has taught economics and communications in several universities, including the University of Ottawa, where he currently teaches part-time. He is the author of two books and numerous articles in the field and has been called to testify on several occasions as an expert before Canadian tribunals. He is a frequent consultant to the Department of Communications.

**Conrad Winn** is Associate Professor of Political Science at Carleton University and an Associate of the Centre for Public Policy and Program Assessment. He has taught environmental studies and history, and is a former Secretary-Treasurer of the Canadian Political Science Association. His publications have been concerned with political behaviour, public policy, and public expenditures. He has been a consultant in copyright, broadcasting, and other fields.



## PREFACE

Canada's Copyright Act has not been revised since coming into force in 1924. The Government of Canada through the agency of the Interdepartmental Copyright Committee has been studying copyright issues. In view of the complexity of the issues underlying this important area, the Department of Communications retained Dr. Robert E. Babe, a consulting economist, and Professor Conrad Winn of Carleton University to prepare a study on cable copyright liability from the perspective of Canada's broadcasting policy.

Broadcasting Policy and Copyright Law: An Analysis of a Cable Rediffusion Right is a unique study in that for the first time the two subjects of broadcasting policy and copyright law are considered as two interactive and complementary streams of policy. This study will cause the reader to stop and consider basic questions such as how the new Copyright Act should be coordinated with Parliament's declaration of broadcasting policy in section 3 of the Broadcasting Act.

Our departure point is the landmark study, Copyright in Canada: Proposals for a Revision of the Law, written by A.A. Keyes and C. Brunet, and published in 1977 by Consumer and Corporate Affairs Canada. From the perspective of Canada's broadcasting policy, Dr. Babe and Professor Winn examine the pros and cons of the Keyes and Brunet recommendations concerning simultaneous cable rediffusion of broadcasts. They also consider the question of alternatives to cable copyright, and in conclusion, they advance definite recommendations as to what should be contained in the new Copyright Act for cable rediffusion.

Of course, the views expressed in this study are those of the authors and are not necessarily those of either the Department of Communications or of the Government of Canada. The department welcomes comments from groups or individuals interested in this study.



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As always, we note that all errors, omissions, and foibles are purely of our own doing.

# Executive Summary

*by Conrad Winn*

In April, 1977, the Department of Consumer and Corporate Affairs published a working paper by A.A. Keyes and C. Brunet entitled **Copyright in Canada: Proposals for a Revision of the Law**. The working paper considered a wide range of questions relating to copyright. In the field of broadcasting Keyes and Brunet recommended that Canadian broadcasters be granted a right to authorize the simultaneous rediffusion of their Canadian broadcasts. Keyes and Brunet proposed the creation of a Copyright Tribunal with authority to determine the amounts and procedures relative to the distribution of royalties to Canadians.

In November 1980, Robert E. Babe and Conrad Winn were commissioned by the Department of Communications to evaluate the strengths and weaknesses of the Keyes-Brunet proposals from the perspective of federal broadcasting policy and other related policies. The attached report consists of 10 chapters plus appendices. Each chapter was written by one or other of the two authors but reflects the substantive judgements of both. The concluding chapter especially embodies the views of both authors, having been revised in an interactive fashion on several occasions.

In Chapter 1, *Introduction*, R.E. Babe identifies the two principal themes of the report -- copyright and communications. He notes that copyright law determines the parameters for the allowable use of and payment for copyright material. Copyright law therefore becomes an instrument permitting government to influence the flow of information and cultural expression in society. Communications policy consists of a set of government goals for society, the achievement of which is sought by means of copyright and/or by means of many other possible instruments of government. The traditional communications goals for Canada have included encouraging a greater sense of Canadian self-awareness and a greater sharing of information and expression within Canada.

The impetus to reform copyright arises from the fact that Canadian copyright law, modelled on the British statute of 1911, does not fully encompass newer electronic technologies. The active review of Canada's copyright law began with the Ilsley Royal Commission in 1954. There followed a major Economic Council study in 1971 and several works initiated by Consumer and Corporate Affairs, of which the Keyes-Brunet report was the most encompassing.

The consultants were asked to undertake five tasks:

- (1) to evaluate the Keyes-Brunet proposal that "Canadian broadcasters be granted a right to authorize the simultaneous rediffusion of their Canadian broadcasts" and the proposal to establish a Copyright Tribunal,
- (2) to assess the Consumer and Corporate Affairs paper, "Copyright Obligations for Cable Television: Pros and Cons," prepared by S.J. Liebowitz,
- (3) "to assess the potential of copyright law to resolve the apparent problem between cable rediffusion of U.S. TV signals and the protection of exclusive broadcast rights purchased by Canadian stations,"
- (4) to discuss the type, manner, and desirability of rediffusion payments "taking into account such complexities as Canada-U.S. relations,"

(5) to recommend feasible alternatives to rediffusion payments.

In Chapter 2, *Copyright as Property*, R.E. Babe defines copyright as a specialized branch of property law pertaining to the class of productive property known as intellectual property. The rights to property are seen as a claim to monetary or non-monetary benefits as enforced by government. Quoting the noted 18th century utilitarian philosopher, Jeremy Bentham, Babe observes that

Property and law are born together, and die together. Before laws [including common laws] were made, there was no property; take away laws, and property ceases.

As a result of the increasing separation of ownership and control in the modern economy and as a result of the growing importance of knowledge and other ephemeral goods, property should no longer be viewed primarily as a claim to physical possession. Furthermore, property rights should normally be treated as restricted rights. Otherwise, the unrestricted rights of some may do damage to the rights of others.

The nature of property rights and the restrictions which are placed upon them may change from country to country and from era to era depending upon the types of physical or ephemeral goods in existence and depending upon the priorities of government. Legal definitions of property provide the environment in which economic forces operate. Because the assignment of rights affects what is produced, governments employ legal definitions of property as a means of achieving societal objectives.

Governments have a special need to give careful legal definition to property in those instances where public goods are involved or where significant externalities arise. Public goods or social wants are those activities such as defence or broadcasting whose benefits are not restricted to those who choose to pay.

In Chapter 3, **Property Rights in Broadcasting**, R.E. Babe confronts the inconsistency between societal objectives as expressed in the **Broadcasting Act's** commitment to Canadian content and societal objectives as revealed by viewer preferences for foreign-produced programs. He suggests that Canadians do desire a broadcasting system which enhances the sense of nation but are disillusioned with the programming which is actually produced by Canadians under the incentives provided by the current system of property.

Under the current system of property, cable companies are legally entitled to rediffuse broadcasts without compensation to copyright owners and are entitled to delete and substitute commercial messages, at least in the case of U.S. broadcasts. The property rights of cable companies are somewhat circumscribed by regulation so that CRTC permission is required, for example, before any rediffusion actually takes place.

Under CRTC regulation, cable companies are treated like public utilities insofar as they are enfranchised on a monopoly basis and their rates are subject to approval. But, unlike public utilities, cable companies are not obliged to service unprofitable areas and their profits are exempt from direct scrutiny. Cable television is highly profitable. For the year, 1978, Dr. Babe estimates the sum of \$28.6 million as the industry's surplus earnings, i.e. earnings over and above those required to yield 15 percent on invested capital after tax.

The private television broadcasting industry is substantially more profitable than cable, having pre-tax rates of return on net assets and working capital of 45 percent in 1977 and 55 percent in 1978. Compared to the CBC, the private broadcasters provide relatively little Canadian content, little independently produced Canadian content, and little Canadian content capable of attracting large audiences.

The smaller amount of Canadian and independent programs in private broadcasting is attributable to two factors: the lower costs of audience-catching foreign produced programs and the system of property in the Canadian broadcasting system. Private broadcasting could be made accessible to independent creators if

private broadcasting were restructured by government, possibly according to the British model. But, given the current system of property, the CBC has an incentive, but the private broadcasters do not, to make use of the talents of independent production companies.

In Chapter 4, *Some Economic Issues*, R.E. Babe discusses whether copyright amounts to monopoly or whether it constitutes merely another property right. If copyright is perceived to be a form of monopoly, it is probably logical to conclude that most copyright laws should be weakened or abolished, not strengthened. But, if copyright is perceived to be just another property right, what should be done about copyright will be judged according to how well the marketplace has contributed to the broad goals of society.

In practice, television viewing provides a wide range of choice so that the television programming industry does not constitute a monopoly. Viewers are normally able to choose between stations, between different programs on the same station, and between television and no television. Successful programs breed imitations. Furthermore, conventional broadcasting is being challenged by dozens of channels delivered via satellite and by the growing videodisc market. Telephone companies, electric utilities, and cable systems are true monopolies. It is at best an exaggeration to suggest that copyright law bestows upon the originators of television programs a significant degree of monopoly.

In Chapter 5, *Cable Copyright, Cultural Policy, and Broadcasting Policy*, Conrad Winn assesses the Keyes-Brunet proposals on the basis of the principles which underlie Canadian cultural and broadcasting policies. He observes that it is difficult to identify these principles. The very idea of culture is a conundrum. Is culture the activity of traditional artists and artisans, or does it encompass all activity impacting on values, beliefs, and identity? For practical reasons, Dr. Winn advocates a middle range concept, which encompasses education, religion, and mass communication along with traditional cultural sectors such as music and publishing. Various impediments to the formulation of cultural policy are also discussed: the weakness

of national symbols, biculturalism, federalism, pragmatism, Puritanism, and the perceived totalitarian implications of government involvement in culture.

Four principles of federal cultural policy are identified. The first principle is to enhance the cultural awareness and identity of Canadians. The second principle is to emphasize mass culture, especially broadcasting. The third principle is to augment the resources of Canadian cultural producers so that they can compete more effectively in the marketplace. The fourth principle is the ideal of cultural freedom. Dr. Winn discusses how these principles of cultural policy are paralleled in broadcasting policy.

The chapter concludes that the Keyes-Brunet proposals are consistent with the main principles underpinning Canadian cultural and broadcasting policies. Principle # 2, which emphasizes mass culture and broadcasting, implies that a rediffusion right should be given the most serious consideration. Principle #1, the enhancement of indigenous cultural expression, is implemented in the Keyes-Brunet proposal to protect Canadian broadcasts only. In the absence of CRTC regulation, the copyright protection of Canadian broadcasts might discourage the cable carriage of Canadian broadcasts. But, the selection of channels carried by cable is subject to regulation. Principle # 3 (more resources for Canadian producers) would be achieved if the rediffusion right were structured so that Canadian artists/creators/producers received higher revenues. Principle # 4 (cultural freedom) would be achieved if special consideration were given to Canadian artists/creators/producers who are independent.

In Chapter 6, **Copyright, Federal-Provincial Relations, and International Relations**, Conrad Winn observes that copyright falls under the exclusive authority of the federal government. Nonetheless, the federal government may benefit by consulting the provincial governments. Copyright policy has implications for cultural industries in which provincial governments have an interest. Inter-governmental consultation on copyright may become a catalyst for greater provincial support for cultural

industries and greater inter-provincial and federal-provincial coordination of effort. At the present time, provincial views of a cable rediffusion right are partly inchoate and partly divided. As a result of consultation, provincial governments may become more sensitive to Ottawa's difficulties in reconciling inter-provincial and inter-regional differences. Consultation may also yield novel policy proposals. Yet, the need for consultation should not unduly delay the long awaited revision of the law.

With respect to international relations, Dr. Winn argues that Canada's multilateral obligations do not rule out a rediffusion right for Canadian broadcasts only. Canada is entitled to protect indigenous cultural products such as broadcasts which are not subject to the copyright conventions to which Canada has acceded. Canada's commitments under GATT do not prevent the introduction of a limited rediffusion right because GATT strictures against protectionism include many exemptions for cultural motives.

United States reaction is likely to be less forceful than it was in the case of the removal of tax deductibility for advertising on U.S. border stations because the loss of revenue represented by the Keyes-Brunet proposal is potential rather than immediate. If Canadian cultural policy becomes more protectionist, the U.S. government may become less resistant. The political influence of U.S. border broadcasters may diminish as the American government assesses the true importance of cultural policy as compared to energy, water, and other more salient bilateral matters. U.S. reaction to Canadian initiatives may be attenuated in the case of an analogue outside copyright law or in the case of copyright protection for non-commercial broadcasts, which in practice are predominantly Canadian.

Depending on how it is interpreted, the Keyes-Brunet proposal may protect not just Canadian content broadcasts but all broadcasts for which Canadian broadcasters hold exclusive Canadian rights. The latter interpretation implies a copyright provision for non-simultaneous substitution/deletion of programs imported by cable where the Canadian broadcaster possesses sole local rights. The U.S. government might not react as negatively

to such a policy as might be expected because the copyright owners of U.S. programs would anticipate increased revenues from their Canadian market. These U.S. copyright owners would not experience a corresponding loss in their American market because U.S. border broadcasters pay for their programs on the basis of the size of their local American audiences. A copyright provision for non-simultaneous substitution/deletion would be consistent with the internationally recognized principle that rights can be subdivided nationally and regionally.

In Chapter 7, **Administrative and Regulatory Issues**, Conrad Winn surveys the U.S. experience with compulsory licensing in rediffusion. Under the U.S. **Copyright Act** of 1976, cable systems make payments for the right to rediffuse broadcasts, Canadian included, and the U.S. Copyright Royalty Tribunal subsequently determines how these rediffusion revenues are to be allocated among copyright claimants. From the confusing, informal, and disputatious American experience, the central conclusion to be drawn is that Canadian law should provide clear and simple formulae for the generation and allocation of payments and should authorize only limited regulatory delegation. Simple formulae for generating royalties from cable systems and for their allocation to claimants will diminish the likelihood of error. Detailed limitations on the latitude of the copyright regulatory authority could reduce the possibility that the licensing scheme, when administered, will depart greatly from legislative intent.

The chapter's second conclusion is that the Government of Canada should consider exploring fully the extent to which Canadian interests may have suffered under the U.S. Tribunal's administration of compulsory licensing. Under the U.S. scheme, cable companies must pay 4 times more to carry the broadcasts of the CBC than of those of regular American networks. Neither this fact nor the CBC's unique ownership of many of its own programs was reflected in the subsequent allocation of royalties to the Corporation. The CBC's very small initial allocation, now before the U.S. courts, emerged from the Tribunal's informal decision-making environment in which the Motion Picture Association of America exercised enormous influence and reaped the lion's share of benefits. If Canadian interests have been harmed and if Parliament enacts a scheme which provides direct

payments to American interests, it may be desirable for Cabinet to retain authority to make the transmission of royalties to American interests contingent on a satisfactory resolution of royalty allocations under the U.S. scheme.

In Chapter 8, *Cable Copyright and Other Potential Rights*, Conrad Winn suggests that future technological innovation will stimulate a demand for new rights and that a rediffusion right should be constructed so as to exclude undesirable characteristics which could be turned to later as precedents. Seven principles are suggested: (a) priority for Canadian matter, (b) incentives for products providing social benefits, (c) meaningful benefits, (d) allocative simplicity, (e) allocative validity, (f) administrative and adjudicative simplicity, and (g) foreign policy consistency. Winn expresses the view that it is better to have no rediffusion right than one which directs most revenues to foreign owners or one which fails to provide meaningful financial benefits to Canadian creators. He suggests that rights should be conferred not only on the basis of doing justice to creators but also on the basis that Canadians receive collective social benefits when copyright law encourages the production of certain kinds of works. In order to avoid the complex, disheartening disputes which characterize the American experience, Canadian law should identify clearly the contributors and beneficiaries of royalties. Reliable and valid data bases should be used for estimating payments. Statutory provisions for changing the level of payments as a result of inflation or for resolving disputes should be simple, and new regulatory bodies should not be created.

In Chapter 9, *Alternatives to Copyright*, Conrad Winn observes that copyright is the most appropriate but by no means the only instrument which can be used to protect exclusive program rights, to compensate the owners of broadcast programs, or to achieve such related policy goals as strengthening the position of independent Canadian creators. The main reason for many countries to resort to analogues of copyright rather than copyright itself is to avoid granting a public lending right or other such right to non-nationals, otherwise required by the Berne and Universal Copyright Conventions. However, as Keyes-Brunet have shown, Canada is legally free to protect only

Canadian broadcasts. Furthermore, broadcasting is too high-profile a matter for it to make a great difference to Canada-U.S. relations whether Parliament favoured Canadian broadcasts by using a low-key instrument such as excise taxes or high profile copyright law.

Payments could be allocated to the owners of rights in programs from a revenue pool created from an excise tax on cable systems in a manner analogous to that of a compulsory licensing scheme in copyright. However, excise taxes do not carry the same longterm implications as copyright and do not reflect well the principle that users should pay. Grants programs to creators could be established. But, grants are not as efficient as copyright royalties for encouraging the consumption of indigenous cultural products. Simultaneous program substitution by the CRTC could be enlarged to include non-simultaneous substitution /deletion. The United States may be more prepared to see program substitution as a disinterested attempt to protect economic rights if it emanated from copyright than if it emerged from the CRTC, whose motives could be perceived to be nationalistic and protectionist. Copyright law is also advantageous because it can help provide order in a revolutionary marketplace, which includes not just the cable rediffusion of broadcasts but also the secondary use of broadcasts by videodisc suppliers and potentially the rediffusion by broadcasters of satellite programs owned by cable companies.

Chapter 10, **Conclusions and Recommendations**, represents the joint effort of both authors. One point of departure is that copyright law influences the structure of incentives in the marketplace. Copyright is therefore a suitable means for achieving the Canadian content goals of the federal government. A second point of departure is that the enormous profitability of private broadcasting in Canada has not made possible significant development in the private sector of the Canadian program production industry. A third point of departure is that cable operations are highly profitable as a result of public demand for cable services, monopoly status, a lack of profit regulation, and a lack of copyright liability. A fourth point of departure is that market foreclosure and the present structure of incentives have largely deprived Canadian audiences of exposure to the creative talents of independent Canadian production companies.

The two major policy choices to consider are (a) what form compulsory licensing in rediffusion should take, and (b) whether or not cable substitution/deletion should be embodied in copyright law to protect the exclusive Canadian rights in foreign produced programs purchased by Canadian broadcasters.

Compulsory licensing may follow the Keyes-Brunet model ("Canadian broadcasts") or the Economic Council of Canada model ("non-commercial broadcasts"). Although the Keyes-Brunet report is the best single source of knowledge and recommendations on copyright as a whole, in the particular instance of rediffusion we prefer the Economic Council model on the grounds of effectiveness. Public broadcasters in Canada have fulfilled much more adequately than private broadcasters the Canadian content goals of the *Broadcasting Act*. This continuing situation is unlikely to be affected by rediffusion royalty payments to private broadcasters.

With respect to Canada-U.S. relations, the Keyes-Brunet model may be perceived to be superior in principle because it entails no direct outflow of royalties in contrast to the small payments to PBS under the Economic Council model. However, the United States now expects copyright reciprocity as a result of its unilateral protection of Canadian broadcasts under its new compulsory licensing scheme, however inadequate that protection may turn out to be. The Economic Council proposal to protect only non-commercial broadcasts would have the effect of retaining the bulk of payments in Canada at a lower cost in terms of an American response than might arise from the Keyes-Brunet model.

**Recommendation 1** is that cable copyright be invoked as a percent of gross cable system income (eg. 20 percent), to be adjusted annually by a regulatory authority so that the bulk of earnings surplus to the capital attraction requirements of the industry flow to broadcasting and program production.

**Recommendation 2** is that royalties assessed on the basis of cable systems' gross earnings be distributed to the noncommercial broadcasters and independent producers of commercial-free programs on the basis of a point system. Noncommercial broadcasters would be credited 1 point for every hour of

rediffused, commercial-free, internally produced programming. Non-commercial broadcasters would be credited 3 points for every hour of rediffused, commercial-free, independently produced programming. The independent producers of commercial-free programming on non-commercial television would be credited 7 points per hour. Each month, a cable system's royalty obligations would be distributed to non-commercial broadcasters and independent producers in proportion to their share of the points earned for that cable system.

**Recommendation 3** is that independent producers be rigorously defined as fully independent of broadcasters.

**Recommendation 4** is that a revised Copyright Act provide for the principle that foreign broadcasters and foreign independent producers be encompassed in the proposed statutory licensing scheme, but that an order-in-council be required for payments to be made to broadcasters and independent producers in any given foreign jurisdiction. The Canadian government would assure itself that Canadian broadcasting copyright interests were receiving equitable treatment in any given foreign jurisdiction before interests from the given jurisdiction could receive financial benefits under the proposed statutory licensing scheme.

**Recommendation 5** is that copyright legislation enforce contractual arrangements for program exclusivity with respect to the unauthorized cable importation of distant signals and with respect to the unauthorized rediffusion of satellite signals by terrestrial broadcasters.

**Recommendation 6** is that copyright liability be invoked in all cases where commercial deletion and substitution takes place and that commercial deletion and substitution be authorized only for Canadian programs broadcast on Canadian stations.

Under these proposals, the CBC and provincial non-commercial networks will benefit from royalty revenue and from incentives to remain or become free of commercials.

Independent producers and the creative personnel performing services for them will benefit from a favourable royalty point system to the extent that their programs are broadcast on non-commercial television.

Private Canadian broadcasters will gain protection of their exclusive program rights against cable importation. They will gain copyright protection against unauthorized commercial deletion and substitution. And, they will gain higher advertising revenues as the CBC responds to rediffusion royalty incentives to reduce its volume of commercials.

Viewers will gain from decreased advertising on CBC and from increased exposure to improved independent productions. Some deletion of distant signals to protect exclusive program rights may prove annoying until the technology is in place to permit non-simultaneous substitution in those instances where the local broadcast of the imported program is broadcast first.

Cable companies will gain from copyright protection for their pay-TV, satellite, and conventional cable programing. The cable industry may also prefer compulsory licensing to the possibility of public utility-style regulation as recommended by the Clyne Committee.

Generally, our proposals conform with the spirit and substance of the Broadcasting Act by strengthening public broadcasting as a result of new royalties, by stimulating the independent program production industry, by protecting the stake of private broadcasters in their exclusive program rights, and by protecting the programming owned or originated by cable. Our proposals conform with the Canadian government's longstanding commitment to the cultural industries. They are administratively simple. And, they will keep international differences to a minimum.

Appendix I is concerned with **Efficacy and the Allocation of Property Rights** (Babe) while Appendix II examines S.J. Liebowitz's **Copyright Obligations for Cable Television: Pros and Cons** (Babe). Appendix III contains excerpts from the **U.S. Copyright Act**.



## CHAPTER 1

# Introduction

*by Robert E. Babe*

### TWO STRANDS

In April 1977, the federal Department of Consumer and Corporate Affairs published a working paper by A.A. Keyes and C. Brunet entitled **Copyright in Canada: Proposals for a Revision of the Law.**<sup>1</sup> The working paper addressed many, if not virtually all, matters relating to copyright. Of particular relevance to the present study were recommendations pertaining to the possible imposition of copyright liability on cable television systems for the simultaneous rediffusion of Canadian television and radio broadcasts. At present no such copyright liability exists and, consequently, cable companies are not required to make payments to television or radio program rights-holders for the economic use made of such programs. Economic use is indeed made of these programs since cable companies deliver for a fee broadcast programs to subscribing households and in the absence of such programs no subscriber fee could be collected.

Keyes and Brunet specifically recommended:

- "that Canadian broadcasters be granted a right to authorize simultaneous rediffusion of their Canadian broadcasts."

- "that, as the granting of the foregoing right will entail determining a basis for and the payment of royalties, appropriate regulatory mechanisms be established."
- "that the [proposed] Copyright Tribunal fix the appropriate fees and establish the necessary safeguards to ensure the equitable assessment, collection and distribution of royalties to Canadians."
- that copyright protection be provided, by means of a right to rediffuse, to Canadian broadcasts, since broadcasts are not protected by the international copyright conventions. Protection under the recommendation is to be restricted to Canadian broadcasts incorporating Canadian material.
- that in respect of the operations of cable systems these rights be provided in any new Copyright Act.<sup>2</sup>

The present study was commissioned by the Department of Communications to assess the pros and cons of the Keyes-Brunet proposals from the point of view of Canadian broadcasting and communications policy as well as to consider alternative policies. These terms of reference imply that a number of related questions must be addressed. First, is copyright law a suitable and appropriate tool by which to pursue communications policy? If not, what alternative policies (analogues to copyright) relating to cable television can be suggested that would be appropriate? Secondly, if copyright law is indeed a suitable and desirable method of furthering communications policy, are the Keyes and Brunet proposals the most suitable or are there alternative copyright law provisions that could be deemed more workable, effective or appropriate?

It is evident that the consultants are to address two hitherto largely separate fields of law and policy and to assess the feasibility and desirability of integration for matters of public policy, namely copyright law and communication (broadcasting) policy. It is appropriate to begin our analysis by offering a few preliminary comments on these two main strands of our project.

### COPYRIGHT

The essence of copyright is to restrict the right to reproduce or perform individual creations to their originators or assignees.<sup>3</sup> Through such restriction, the originator attains a monetary reward bearing some relation to the degree to which his work is accepted by the community. In the absence of copyright, other interests would be able to duplicate or exhibit the work for purpose of sale, without having endured the trials and tribulations of creation. If widespread, such practices would detract from the monetary reward that would otherwise accrue to the author, composer or artist.

Copyright, then, is both a means of securing reward to creators for previous productions and an inducement to further creative activity. Copyright law represents a trade-off between rewarding and encouraging creators on the one hand and restricting the distribution of their creative output on the other.

Copyright has as its philosophical or intellectual foundation the notions of property, commodity, exchange and markets. Conceptually, the author or composer may be viewed as taking his work into the marketplace and, through his exclusive right to duplicate, receiving his financial reward from the sale of his work to intermediaries or the general public. Historically, this model of copyright was based on the idea of exclusive rights to duplicate materially encapsulated intellectual output or the public performance of the same.<sup>4</sup>

It can be seen then that copyright is "a means to channel and control flows of information in society", that it is a means of bringing "the world of science, art and culture into relation with the world of commerce."<sup>6</sup>

The system of copyright helps set in place the market forces "which determine what music is heard, what records are made, what films are seen, what books are published, and what programs are seen on television."<sup>7</sup> Therefore, copyright touches upon much that gives society its flavour, shape and direction. For this reason alone, one could conclude that "policies in the field of

intellectual property rights must ... be defined in relation to policies for education, culture, information and communications generally."<sup>8</sup>

While copyright is a means of channelling and controlling flows of information in society, it is not the only means. And, while copyright has as its philosophical foundation the notion of information as commodity, such is not the only notion of information.

Information and creative outputs can be viewed also as social resources, in which case full reliance upon private exchanges through market mechanisms could be viewed as being insufficient or undesirable. First, information and knowledge are prerequisites to all other resource use. It is the perception and evaluation of resources which makes their use possible. The quantity and accessibility of information or knowledge therefore determines the useful availability of all other resources.

Furthermore, information has the characteristic of a public good insofar as it is not diminished or used up by wider use and sharing. On the contrary, its social value (as opposed to private value) increases with use and availability.<sup>9</sup>

Finally, the shared information pool tends to define the outer limits of the society or community. Shared language is an obvious case in point but the factors involved run much deeper than this. "Knowledge of any kind whatsoever depends on the possibility of communicating and comparing meanings within a community"<sup>10</sup> and meanings will be difficult, if not impossible to compare, if there does not exist a more or less common reference point. Furthermore, a common reference point likewise defines the boundaries of the community. Even in the highly specialized field of mathematics it is asserted that communications have to some extent broken down among rival "camps" which initiate their studies from differing presuppositions.<sup>11</sup> So much more true for a nation such as Canada, termed a cultural and regional "mosaic", in which the flow of information within is small compared to the in-pouring of information from without.<sup>12</sup>

A further complication regarding copyright arises from technological change. Canada's present copyright legislation,<sup>13</sup>

enacted in 1921 and taking effect in 1924, was broadly based on the 1911 British statute.<sup>14</sup> Insofar as this legislation was framed in the age of print, present law may no longer be fully adequate to deal with newer electronic technologies of information distribution. For example, the **Copyright Act** lends protection to the production and reproduction of "works" in any "material form" and to the "public performance" of a "work".<sup>15</sup> But, as noted by the Economic Council of Canada, "recent technological changes have rendered increasingly difficult the task of the courts in determining what is meant by material form and public performance."<sup>16</sup> There may even be difficulties in determining what constitutes "a work".<sup>17</sup>

Audio and visual magnetic tape recorders, cable television, radio and television broadcasting, video discs, microwave, optical fibre, computer data banks, videotex systems, communications satellites, photocopiers - these all demonstrate the significance of electronic means of information storage, retrieval and distribution. All serve to lessen or to do away with the "material form" upon which copyright law is currently based; all bring into question the effectiveness of laws designed to control "reproduction". Imminent technological changes in the means of distributing television programs could have wideranging implications for the efficacy of present copyright law in inducing the production of television programming.

It appears likely that, in the near future, satellite interconnected cable television systems across Canada will become a major means of distributing programming, packaged by either cable companies themselves, or by others, to subscribing households.<sup>18</sup> The offerings will include pay television service whereby subscribing households will be required to pay an additional fee for their additional programing. Such new techniques will add further strain to an **Act** passed at the onset of the era of electronic mass communications.

In the absence of copyright protection against cable importation of programs, it is conceivable that the role of the local broadcaster will decline in the face of increased competition from "superstations" distributed throughout the country by cable systems interconnected by communications satellites. At present, broadcasters purchase "exclusive rights"

to diffuse programs in their market areas; the current **Copyright Act**, however, does not protect the market exclusivity of program rights when stations, including "superstations", are imported by cable television. By eroding market exclusivity of copyright, cable systems may be a factor in causing copyright holders in the future to withhold programs from sale to individual markets (that is, television stations broadcasting locally only), and to demand recompense for national coverage from "superstations" transported by satellite to cable systems throughout the country.

It can be seen from the foregoing remarks that copyright legislation is indeed an instrumental force in the structuring and restructuring of Canadian broadcasting. And, revisions to the **Copyright Act**, or alternatively legislation additional to copyright legislation (which would incorporate "other rights" or analogues to copyright), will also be of major significance.

Canada's copyright legislation has been under active review for a number of years. In 1954, a Royal Commission on Patents, Copyright, Trademarks and Industrial Design (the Ilsley Commission) was appointed to make recommendations pertaining to the **Copyright Act**; however, no action was taken pursuant to the ensuing Report, published in 1957.<sup>19</sup>

In 1966, the federal government requested the Economic Council of Canada to study and advise, *inter alia*, on the matters of patents, trademarks, copyrights and registered industrial designs. The Council reported on these matters in 1971. With regard to the issue of cable television copyright liability for television broadcast rediffusion, the Economic Council recommended that cable copyright liability be invoked in those instances where the program material rediffused by cable television systems is unaccompanied by commercial messages or in those instances where cable television systems deleted the commercial messages originally transmitted within the broadcast programs.<sup>20</sup>

Simultaneous with the publication of the Economic Council's report, the federal Minister of Consumer and Corporate Affairs announced "the formation of a planning group to review the report and to make recommendations as to new legislation."<sup>21</sup> Among the documents emanating from this review was **Copyright in Canada**:

**Proposals for a Revision of the Law** by A.A. Keyes and C. Brunet, the most thorough-going treatment of copyright in Canada yet published. The report's recommendations regarding cable copyright liability were noted above.

After the publication of the Keyes-Brunet report in 1977, Consumer and Corporate Affairs organized an Interdepartmental Committee on Copyright and commissioned a number of specialized studies. Of chief importance for our purposes in this regard is the study by S.J. Liebowitz, entitled **Copyright Obligations for Cable Television: Pros and Cons**, published in 1980.<sup>22</sup> Professor Liebowitz recommended that no copyright liability for cable television rediffusion of broadcasts be encompassed in revisions to the **Copyright Act**.

Finally, reporting in 1979 to the Department of Communications, the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, J.V. Clyne Chairman, stated:

The majority of the Committee proposes that when a Canadian broadcaster buys exclusive rights to a program for a given area, cable companies in that area be required to respect these rights and the CRTC to enforce them. This action should not be taken before public discussion and debate, including CRTC hearings. Two members of the Committee (Clyne, Fuford) firmly hold the view that this would be unacceptable to Canadian viewers  
...

The Committee holds the view that eventually this issue may be resolved in terms of property ownership under a revised copyright law. The federal government, which has traditionally exercised jurisdiction in the field of copyright, should urgently undertake a full revision of the copyright law, having regard to the extensive report made by Keyes and Brunet at the request of the Department of Consumer and Corporate Affairs and published in 1977.<sup>23</sup>

It is evident from the foregoing remarks that there exists a diversity of opinion respecting the advisability of invoking

cable television copyright liability for broadcast rediffusions, and also with respect to the nature of such liability should it indeed be invoked. A principal factor explaining the diversity of views is differing weights accorded in the studies to communications (broadcasting) policy, a subject to which we now turn.

### COMMUNICATIONS POLICY

Whereas copyright in the first instance relates to notions of commodity and exchange, Canadian communications (cultural) policy has historically related to information as a resource. The Government of Canada has been an active participant in shaping the flows of information in the country through such instruments as the Canadian Broadcasting Corporation, National Film Board, the Canada Council, Canadian Radio-television and Telecommunications Commission, the Department of Communications, and so forth.

One major factor inducing the government to influence actively the flow of information is the belief that market forces, howsoever constituted through property law, would prove to be insufficient to guard against an undue inflow of American cultural products and would produce an insufficient volume of Canadian creative works. Canadian governments have understood that cultural artifacts define and reinforce our sense of community and, without a steady outpouring of Canadian creative works, the national fabric would be weakened.

This is certainly not to say that the government has not and should not continue to adjust market forces through changes in property law<sup>24</sup> in an effort to further induce Canadian creative work. The 100 percent capital cost allowance for Canadian feature films and the disallowance of advertising placed on American broadcasting stations by Canadian companies for income tax purposes are two cases in point where property law has been adjusted recently in the attempt to further communications goals.<sup>25</sup> Indeed, the present consultants are obliged to consider the implications of revisions to the copyright law respecting cable rediffusion in the context of national goals for broadcasting and communications in Canada. But this comment does not gainsay the initial point that communications policy takes as

its starting point information as a resource whereas copyright is to be associated initially with information as a commodity channelled through markets.

In a position paper issued in 1973, then Communications Minister Gérard Pelletier set forth a number of questions which can be interpreted as a statement of communications goals for Canada. The Minister asked, *inter alia*,

How can Canadian telecommunications systems be developed and used, to the greatest possible extent, to foster Canadian social and cultural values, and to provide a sure means of disseminating a Canadian perception of Canada and of the world to all Canadians?

How can the east/west links which are essential to the social, cultural, and economic development of the country be maintained and developed in relation to the powerful pull of north/south ties?

What are the best means of harmonizing federal and provincial objectives and activities in the field of telecommunications for the greatest benefit of all Canadians?<sup>26</sup>

By 1981, no consensus has been reached on the answers to these difficult questions. More recently, concern has been expressed regarding efforts to increase the plurality of effort in fulfilling national goals. It has been noted that television productions aired in Canada tend to be produced by existing stations and networks, thereby largely foreclosing independent productions from distribution.<sup>27</sup> In assessing the role of copyright vis-à-vis communications policy, the consultants have been advised to consider this element also.

## OUTLINE

Chapter 2 blends the two strands of our analysis in a theoretical way by analysing the interrelations between property law and economic processes. Entitled **Copyright as Property**, the chapter takes the position that copyright law should be viewed as a specialized branch of property law pertaining to

intellectual creations and therefore that principles applicable to property in general are useful as criteria in assessing copyright proposals. Insofar as economic incentives and processes take shape only within the context of property rights, adjustments to economic incentives and processes can be made through adjustments to property law. If Canadian broadcasting is not fulfilling the purposes for which the system has been created, adjustments to property law are required, and copyright represents one of the legal devices available toward this end.

**Chapter 3, Property Rights in Broadcasting**, analyses the current system of rights held by television broadcasting and cable television companies from the point of view of their economic and financial performance and the goals proclaimed for broadcasting in the **Broadcasting Act**. It is concluded that both industries are highly profitable but that performance in the context of the objectives of the **Broadcasting Act** has been inadequate. Therefore, adjustments to the system of property are required. The question then becomes whether copyright law should be used in this regard.

**Chapter 4, Some Economic Aspects of Cable Copyright Liability**, addresses such economic questions as whether copyright should be considered a monopoly; various questions of equity; incidence of cable copyright liability; the financial impact of cable television on broadcasters; economic aspects of program exclusivity and violation thereof through cable importation of distant signals; and economic incentives forthcoming from recommendations of both the Economic Council of Canada and Keyes-Brunet pertaining to cable copyright liability. An appendix to this chapter is devoted to the Liebowitz study referred to earlier.

**Chapter 5, Cable Copyright, Cultural Policy, and Broadcasting Policy**, discusses four precedents and policies pertaining to federal government support of cultural activity: an emphasis on support to mass culture in general and broadcasting in particular; enhancement of indigenous cultural expression; an economic strengthening of Canadian artists/creators/producers so they can compete more effectively in foreign and domestic markets; and freedom of cultural expression and enjoyment.

Chapter 6 is entitled, **Copyright, Federal-Provincial Relations and International Relations**. We address the issue of consultation between the federal government and provincial governments regarding **Copyright Act** revisions. Internationally, we note that a protectionist rediffusion right of the kind recommended by Keyes-Brunet would be allowable under Canada's treaty obligations with respect to copyright and would be substantially allowable under Canada's GATT obligations. The authors recognize the possibility of United States concern, however, if a protectionist **Copyright Act** were enacted. The chapter identifies courses of action to minimize the possibility of international repercussions while permitting Canada latitude to strive for its own domestic policy goals.

Chapter 7, entitled **Administrative and Regulatory Issues**, surveys the American experience with regard to copyright legislation and administration with a view to learning from this experience. The chapter also examines in some detail the possibility that Canadian interests may have been treated unfavourably under the U.S. scheme of compulsory licensing for rediffusion. We analyse the implications of establishing a Copyright Tribunal in Canada with a role additional to and independent of the CRTC. We assess various criteria for determining copyright fee schedules and for distributing such funds among copyright holders.

Chapter 8, **Cable Copyright and Other Potential Rights**, develops a number of principles that should govern any legislation pertaining to new rights regarding intellectual property:

- (a) such new rights should give priority to Canadian matter;
- (b) such rights should establish incentives for cultural products providing social benefits;
- (c) such rights should entail significant financial benefits;
- (d) they should be easy to administer;
- (e) collection and allocation of funds should be based on reliable and valid data; and
- (f) such new rights should be consistent with foreign policy.

Chapter 9, **Alternatives to Copyright**, looks at analogues to and substitutes for cable copyright, while Chapter 10 contains our conclusions and recommendations.

## NOTES

1. (Ottawa: Minister of Supply and Services for the Department of Consumer and Corporate Affairs, 1977).
2. *Ibid.*, pp. 143-4.
3. John Shelton Lawrence and Bernard Timberg, eds., *Fair Use and Free Inquiry: Copyright Law and the New Media* (Norwood, N.J.: Ablex, 1980), p. 4.
4. This market-place ideal is, in practice, attenuated. Note the remarks of Ploman and Hamilton in this regard:  
"However, the ideal market-place is no more a reality in the copyright field than in other economic relations. The ideal of the individual creator being able to sell his work to the highest bidder in the market-place was probably always more the exception than the rule. With the exception of a few famous creators, the author would generally be in a weak position in the negotiations with publishers or other users of his work and would thus benefit only imperfectly from the results of his intellectual labour." Edward W. Ploman and L. Clark Hamilton, *Copyright: Intellectual Property in the Information Age* (London: Routledge and Kegan Paul, 1980), p. 27.
5. *Ibid.* p. 25
6. *Ibid.*
7. Keyes and Brunet, *Copyright in Canada*, p. 3.

8. Ploman and Hamilton, **Copyright: Intellectual Property in the Information Age**, p. 39.
9. As is true with any monopolistic restriction, value to select users may decrease with wider availability while value to all users increases.
10. Gordon D. Kaufman, **Relativism, Knowledge and Faith** (Chicago: University of Chicago Press, 1972), p. 73.
11. Morris Kline, **Mathematics: The Loss of Certainty** (New York: Oxford, 1980).
12. Equally, a break-down in community can take place if historical information (reflected in song, poem, custom and tradition, for example) is submerged in a flood of temporal images. Again, this may well be happening today. See George Steiner, **In Bluebeard's Castle: Some Notes Towards the Re-definition of Culture** (London: Faber and Faber, 1971) and Harold Innis, **The Bias of Communications** (Toronto: University of Toronto Press, 1951).
13. **Copyright Act**, R.S.C. 1970, C.C.-30.
14. Economic Council of Canada, **Report on Intellectual and Industrial Property**, (Ottawa: Information Canada, 1971) p. 130.
15. *Ibid.*, pp. 130-131.
16. *Ibid.*, p. 131
17. Ploman and Hamilton, **Copyright: Intellectual Property in the Information Age**, pp. 173-174.
18. See Committee on Extension of Service to Northern and Remote Communities, Real Therrien, Chairman, **Report - The 1980's, A Decade of Diversity - Broadcasting, Satellites and Pay-TV** (Ottawa: Minister of Supply and Services for the Canadian Radio-television and Telecommunications Commission, 1980).
19. Royal Commission on Patents, Copyright, Trademarks and Industrial Design, **Report on Copyright** (Ottawa: Queen's Printer, 1957).
20. Economic Council of Canada, **Report on Intellectual and Industrial Property**, p. 176.
21. A.A. Keyes and C. Brunet, **Copyright in Canada: Proposals for a Revision of the Law**, p. 1.
22. (Ottawa: Minister of Supply and Services for the Department of Consumer and Corporate Affairs, 1980).

23. Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty, **Telecommunications and Canada** (Ottawa: Minister of Supply and Services for the Department of Communications, 1979), pp. 44-45.
24. In this study, and as developed in Chapter 2, property is defined as claims to benefits (monetary income or non-monetary benefits) that are enforced by society. See C.B. Macpherson, "The Meaning of Property" in C.B. Macpherson, ed., **Property: Mainstream and Critical Positions** (Toronto: University of Toronto Press, 1978), p. 3.
25. E.R.A. Consulting Economists Inc., "An Evaluation of the Impact on the Canadian Feature Film Industry of the Increase to 100% of the Capital Cost Allowance", prepared for Department of the Secretary of State, 1979; and Donner and Lazar Research Associates, **An Examination of the Financial Impact of Canada's 1976 Amendment to Section 19.1 of the Income Tax Act (Bill C-58) on U.S. and Canadian TV Broadcasters** (Ottawa: Department of Communications, 1979).
26. The Honourable Gérard Pelletier, Minister of Communications, **Proposals for a Communications Policy for Canada: A Position Paper of the Government of Canada** (Ottawa: Information Canada, 1973), p. 1.
27. Hugh Edmunds et al., **A Study of the Independent Production Industry with Respect to English Language Programs in Canada with Recommendations for Policy Action, Vol. I** (Windsor: Centre for Communications Studies, University of Windsor, 1976).

## CHAPTER 2

# Copyright as Property

*by Robert E. Babe*

### INTRODUCTION

We return to the two strands of our analysis, namely **copyright law** and **communications (cultural) policy**. The former has its historic and philosophic foundations in the notions of private property, individualism, commodity and exchanges; the latter in public service, community, social utility and sharing of experiences.

At first glance the fundamental premises of copyright law and communications (cultural) policy might appear to be inconsistent. And at certain levels of analysis, such is indeed the case. But at other levels, copyright and communications (cultural) policy may be viewed as being harmonious and mutually supportive. This chapter clarifies these issues so as to arrive at a deeper understanding of the relationship between property law and social policy generally, and between copyright law and communications (cultural) policy in particular. In addition, we address the limitations of economic analysis in providing guidelines for policy-makers as to the allocation of relative claims through property law.

### COPYRIGHT, PROPERTY AND COMMUNICATIONS

Copyright is a branch of property law pertaining to intellectual creations. In principle copyright is distinguishable from other branches of property law only with regard to the types of property falling within its ambit. Just as copyright is a subset of property, so is property a subset of total value. Indeed, we here define property as **proprietary value**.

By developing the distinctions and relations among these concepts, we will be better positioned to arrive at some general principles respecting the allocation of rights which is, after all, what the issue of cable copyright liability is all about.

Property, or proprietary value, is a bundle of claims or rights to benefits protected and enforced by the state. Property comprises claims that are encoded, allocated and enforced by formal rules (law). In market transactions, it is proprietary claims on value that are exchanged.

Property may be exclusive (private property) or non-exclusive (for example public property).<sup>2</sup> While it is only the former that is exchanged in markets, the essence of both types of property is enforcement of a bundle of claims by the state.<sup>3</sup> The particular mix of rights or claims that collectively constitute property is subject to change and redistribution as society itself changes.

Property, or proprietary value, is an impersonal mechanism for holding society together. Property law permits transactions at a distance. Exchanges are motivated generally by the pursuit of self-interest as conceived by the parties. Each party to a transaction wishes first and foremost to increase the proprietary value under his control.<sup>4</sup>

Virtually all law may be considered to be property law insofar as law allocates formally rights, claims and responsibilities. Laws pertaining to privacy, libel and freedom of expression, for example, can be considered laws of property inasmuch as claims held to be of value are sanctioned and enforced by the state. To illustrate, a person's reputation is of value to him, and with the passage of laws respecting libel,

his reputation is transformed from non-proprietary value into property with enforceable claims.<sup>5</sup>

Property rights are almost always restricted; they are seldom absolute. Generally, a property right enforced by the state will entitle its holder to seek benefits in certain ways, but preclude seeking benefits in other ways. For example, television broadcasters may diffuse programs only if they comply with a minimum quota of Canadian content, among other obligations. Titleholders to automobiles must comply with wide-ranging restrictions, such as traffic laws, governing their use of this asset. In other words, the bundle of claims that constitutes property is not exhaustive for any one party.

There is good reason why property rights are seldom, if ever, exhaustive or unencumbered; exhaustive property rights would often be incompatible due to the mutual interdependency of claims. To return to the preceding examples, television broadcasters who concentrate disproportionately on diffusing foreign program material would be conflicting with the claims of audiences to receive Canadian programs and in the process would be eroding the sense of nation. Automobile drivers who do not respect traffic laws interfere with the claims of others to safe passage. As one authority on the subject of property observes,

to permit anyone to do absolutely anything he likes with his property in creating noise, smells or danger of fire, could be to make property in general valueless. To be really effective, therefore, the right of property must be supported by restrictions or positive duties on the part of owners, enforced by the state, as much as by the right to exclude, that is the essence of property.<sup>6</sup>

From these general remarks it can be concluded that the property rights of cable television companies in the rediffusion of broadcasts cannot or should not be exhaustive or unencumbered due to conflicting and competing claims of other parties

including over the air broadcasters, creative artists, viewers and governments. For example, under law cable television is a component of the Canadian broadcasting system and the system is obliged to pursue the goals set forth in the **Broadcasting Act**. It follows that the rights and obligations of cable companies should be structured so as to make a reasonable contribution to the pursuit of these goals.

#### NON-PROPRIETARY VALUE

Total value is comprised of property (proprietary value) and non-proprietary value. The latter comprises aspects of life considered to be worthwhile which are not, and perhaps cannot be, delimited and enforced by the state. Charity, love, empathy are examples of voluntary attitudes or actions, unenforceable in law, yet considered valuable. Non-enforceability excludes these areas from property by definition. Non-proprietary value, therefore, is characterized by voluntarism.

One can conceive of social structures (families, tribes, communes, races and so forth) for which most value is produced and exchanged voluntarily. The secularization of society may be defined from one point of view, as the progressive shrinkage of total value into property (i.e. the decline in non-proprietary value) or contrariwise as the growth of property to encompass or circumscribe total value (i.e. the transformation of non-proprietary value into property). In the process, formal rights, claims and obligations replace voluntary cooperation as the means of organizing society, and the pursuit of self-interest or self-aggrandizement replaces empathy as the driving force stimulating exchanges of value.<sup>7</sup>

The following examples illustrate the distinction between proprietary and non-proprietary value. In the field of labour relations, total value becomes synonymous with property under "work to rule" or under a system of rigidly specified and adhered to job functions. In the area of social welfare, old age security is property (a set of claims supported by law) substituting for the extended family. More generally, the "spirit" of the law correlates with the notion of non-proprietary value, while the "letter" of the law is property.

The distinction between non-proprietary value and property is important for the topic at hand, given the two strands to our analysis noted previously. Copyright is property, while communications (cultural) policy is closely related to non-proprietary value.

In social structures characterized primarily by the exchange of non-proprietary value we can think of the tribal story-teller whose function and responsibility is to maintain cohesion in tribe and family from generation to generation. Communications (cultural) policy in modern society is today's analogue of the traditional story-teller. Communications policy attempts to maintain, strengthen and forge new communications flows in an effort to strengthen the sense of community.

Communications and cultural policy seek to integrate citizens through a sharing of non-proprietary value: history, customs, perspectives, identities. Like tribal story-telling, cultural policy is concerned first and foremost with the exchange of non-proprietary value. Yet, cultural policy must use property in the quest for community integration. An important premise of cultural policy is that indigenous intellectual creations with proprietary claims (eg. copyright works) are embedded with non-proprietary value which will help integrate the community. The extent to which this premise is valid will be examined below in chapter 4.

Government must use property in pursuing its goals because such is the nature and function of government. Government allocates and enforces property rights; it does not and cannot allocate and enforce empathy or cooperation.

We can see then a basic paradox concerning communications policy in modern society. On the one hand government wishes to use communication media and processes to integrate and bind together provinces, regions and individuals from various walks of life into a viable "community". On the other hand, the tools available to government to do this are characterized by compulsion and self-interest which breed divisiveness and impersonality. In commercial television broadcasting the "story teller" (TV station) is allocated a licence to broadcast under

the condition that a certain percentage of the time will be devoted to Canadian productions (compulsion and enforceability). The broadcaster, however, is often reluctant to fulfill the "spirit" of his obligations since American programming is more profitable to him than Canadian (pursuit of self-interest). The advertisers who sponsor the programming are much more interested in producing sales for their various and sundry products than in unifying the country (pursuit of self-interest). Finally, television is a one-way, electronically mediated form of mass communications; it is impersonal.

There is a second paradox too, first described by Harold Innis, the eminent Canadian historian and scholar of communications. Innis argued that there has been a progressive shift in the media of communications over time, from the durable and difficult to transport to the ephemeral and easily transportable. In Innis' terms, "time-binding" media of communication are superceded by "space-binding" media. For example, television broadcasts using satellites can reach the whole country instantaneously, but the messages distributed are not durable, whereas older media are more difficult to transport but the messages are also more durable.

Innis characterized modern Western history as beginning with temporal organization and ending with spatial ... Ultimately, the obsession with space, with the nation, with the moment, exposed the relativity of all values and led Western civilization, in Innis' eyes, to the brink of nihilism.<sup>8</sup>

If Innis is correct, then, the very techniques used by government to bind the country together may promote divisiveness and disharmony. The techniques themselves (television and the associated technologies of cable, satellites, VTR's etc.) by their very nature, emphasize the momentary at the expense of permanence, continuity and other values which are central to cultural policy.

Nonetheless, communications policy must turn to property law since non-proprietary value is not a subject for legislation or enforcement. Communications policy must also use modern

technologies of communications since they are of such widespread use and while this author questions whether communications policy will ever be manifestly successful, due to the limitations noted above, it is also apparent that in the absence of communications (cultural) policy the situation would worsen quickly and drastically; there would be many fewer messages of Canadian origin. The better part of wisdom is to structure property relations in such a way as to be as consistent as possible with the aims of policy.

#### COPYRIGHT

Copyright law is "the legal expression of the rights granted by Parliament to a creator to protect his [intellectual] work against a variety of unauthorized possible uses".<sup>9</sup>

Alternatively, copyright is "a set of laws and practices restricting the right to reproduce or perform individual creations."<sup>10</sup> As is the case with any law, copyright allocates claims among competing interests, in this case between producers and consumers of intellectual material.

As value shrinks into property (or as property grows to circumscribe value), story telling becomes copyrighted. Stories and other intellectual creations come to be produced and disseminated not primarily on the basis of the emotional bond between author or story-teller and the group, but rather as the basis of contractual arrangements governing the exchange of property between producer and consumer, as sanctioned and enforced by law.

With property and copyright, the producer of intellectual output is rewarded on the basis of the aggregate of individual transactions between his consumers and himself, such transactions being generally impersonal in nature. Nonetheless, communications policy, that is the collective input of society as a whole into the communications process, is still integral to the exchange of property, even when the exchange is carried out primarily through depersonalized, individualized transactions.

The "terms of trade" are set by law and law is the outcome of a collective process. Individuals do not pass laws; societies do

this. Individuals act (lawfully) within the established laws, which are enacted collectively. Once more we see how copyright and communications policy are bound together irrevocably. The depersonalized agency of property law substitutes for empathy between author and society, and the transactions tend to become individual rather than collective. Nonetheless society as a whole, through the agency of the state, allocates the rights and duties associated with the transaction.

### THE SIGNIFICANCE OF PROPERTY

Property is the pith and substance of modern societal organization. It creates and maintains relations among people. Indeed, "any system of property is a system of rights [claims] of each person in relation to other persons."<sup>11</sup> More particularly, private property, by excluding non-proprietors from use or privilege, also compels service and obedience; "dominion over things is also **imperium** over our fellow human beings."<sup>12</sup>

Market forces function only within the context of the legal system and, in particular, within the system of property law. Markets entail the exchange of property, but the "terms of trade" are given, in part, by law. More particularly, it is the law that determines "relative rights, relative exposure to injury, and relative coercive advantage or disadvantage."<sup>13</sup> And since these relative rights are determined by law, it follows that "the distribution of relative risk, business cost, and resource allocation, including the distribution and general level of income, are also a partial function of law."<sup>14</sup> In brief, "market forces emerge and take on shape and slope only within the pattern of **inter alia**, legal choices."<sup>15</sup>

Since property is a social artifact, since all forms of property have origins with the state, are defined by it and protected by it, it follows that no set of property rights, once granted, are to be viewed as being "natural" or "immutable". Property, as a social artifact, is the means whereby society sets out (consciously or unconsciously) "to realize the purposes of its members or some of the purposes of some of its members."<sup>16</sup> As society's purposes change, so too is property subject to change.

Continual, radical changes in property law must, of course be considered undesirable insofar as such changes would discourage enterprise and be disruptive. Nevertheless, it is also true that:

It would be as absurd to argue that the distribution of property must never be modified by law as it would be to argue that the distribution of political power must never be changed.<sup>17</sup>

There is, then, a "burden of proof" with respect to change in the law of property, but where this burden should reside is problematic. One point of view holds that "policy choices not to make changes should have as robust empirical support as any other choice."<sup>18</sup> Alternatively others believe that "any form of property that exists has ... a claim to continue until it can be shown that the effort to change it is worthwhile."<sup>19</sup> Irrespective of which view is adopted, change in property rights can be justified by the high degree of social interdependence we experience in society, and as a consequence of the fact that "no man can justly say 'this wealth is entirely and absolutely mine as the result of my own unaided effort.'"<sup>20</sup>

Finally, it is to be emphasized that government, in arbitrating conflicting claims to property, is forced to choose among alternative modes of social organization. And, indeed, the government must always make these choices; it can never stand back and remain "neutral". All property entails claims that will be enforced by the state. In refusing to alter the existing system of rights, as given by existing legislation or perhaps by common law, the parties favoured by the present system of rights have the full power of the state behind them.<sup>21</sup>

#### CRITERIA FOR ALLOCATING PROPERTY

In enacting a law, such as copyright, there are at least three perspectives which legislators must bear in mind: first, the interests of the property holder (the creator of intellectual property); secondly the interests of the potential owner or customer; thirdly interests of third parties, which may extend to the whole of society.

From the point of view of the individual producer, private property rights have always been justified by the right to live and the incentive to produce the means of life. "Private property, in every defence made of it, is supposed to mean, the guarantee of individuals of the fruits of their own labour and abstinence."<sup>22</sup> In this view property, by securing to each man the fruits of his labour, constitutes a moral as well as a legal right in that it ensures that "the producer will not be deprived by violence of the result of his efforts."<sup>23</sup> Without this assurance, the producer would have little incentive to produce, given a society activated by the pursuit of self-interest as opposed to the principle of empathy.

Copyright represents, in the first instance, a trade-off between the interests of the producer of the material in attaining an income from individual sales, and the interests of consumer and potential consumers of intellectual output whose aggregated purchases constitute the income of the author. It could simplistically be maintained that the author has an interest in receiving as high a price as possible whereas the consumer wants to pay as little as possible. Whenever property comes to embrace total value, conflicts of this sort always arise.

To some extent at least these conflicts of interest between producer and consumer are lessened, however, when it is recognized that, in an economic system governed by the exchange of property, higher rewards to creative producers may induce a greater production of valuable material than would be the case if such rewards were limited or nullified. Consumers of intellectual material would surely not be better off if the production of such material were to cease due to an absence of adequate income to the producers of the same.

Legislation dealing with property must strike a balance between the interests of the producer and the interests of the consumer, even while recognizing that these interests, while diverging, are not diametrically opposed.

The interests of third parties and of society as a whole are another perspective which legislators need to bear in mind when enacting property law. Legislators need to be concerned to

achieve cohesion<sup>24</sup> in society and efficiency in the communications process. In its traditional role, the communications system is expected to integrate the country. In the Canadian context, communications originating in Canada must be encouraged as a counterweight to the messages flowing within the country but originated elsewhere. It is noteworthy that legislation designed to encourage the production and distribution of Canadian-authored messages will generally be compatible with the interests of Canadian authors.

In addition to integration or cohesion, society has an interest in efficiency. Intellectual outputs (or information, knowledge, creative "works") are technically known as public goods insofar as the use or consumption of the good by one does not subtract from, and may even add to, the use value on the part of others. One's enjoyment of a television program is not reduced by, and may even be increased by, viewing by others. From this point of view, it is undesirable to exclude through the price mechanism potential users since such users do not detract from use and enjoyment of others.<sup>25</sup>

These efficiency considerations are directly compatible with the individual interests of consumers of information in low prices, but may be incompatible with the interests of authors in higher incomes.

In any event the distribution of property rights has an important bearing on the pursuit of the aims of society. The assignment of property rights (whether they be copyright or otherwise) will affect what is produced and society's monetary valuation of final outputs. Property does more than give title to an income stream. It helps determine what men shall acquire and consider to be important.

Recognition and support of the claims of producers and consumers is very important. But it is also essential to maintain a balanced perspective. Today the largest proportion of wealth is highly abstract and disassociated from both tangible objects and from the proprietor's own labour; this state of affairs is exemplified by the importance of financial instruments such as stocks, bonds, franchises, licences and so forth.<sup>26</sup>

Furthermore, much productive activity entails the manufacture of information and knowledge for which exclusive proprietary rights are difficult (and perhaps undesirable) to maintain in the face of advancing technologies. And finally, the principle of private property in and of itself tells us little about the distribution of relative rights in a highly interdependent world where claims frequently conflict. It is reasonable and desirable, therefore, to construct property rights in such a manner as to fulfill the broad aims of society, even while maintaining security for the individual.

#### ECONOMIC ANALYSIS AND THE DISTRIBUTION OF PROPERTY

When government is considering revision of a property law, it frequently seeks the advice of economists; indeed, one of the present authors is an economist whose advice was so sought. It is important, therefore, to state in a straight forward manner the inherent limitations of economic analysis in matters such as these.

Modern neoclassical economics is a complex, systematized body of thought centering on the notion of **efficiency** (also termed "Pareto optimality"). The rule of efficiency governing "scientific" economic analysis is limited to the question: "Can one or more people be made 'better off' in terms of higher material incomes without making others worse off?"

In dealing with questions concerning the distribution and redistribution of property, objective economic analysis has little to say because redistribution necessarily violates the rule of efficiency stated above. Someone will be made worse off, probably absolutely but certainly relatively.

Virtually every policy enactment by government affects the distribution of property. For example, a recommendation that competition in an industry be increased, if implemented, will erode the market position of established firms, thereby changing the distribution of property. The argument that existing industry members can be "subsidized" or "compensated" by new entrants so as to maintain their pre-competitive position is

unworkable since real competition cannot persist when some competitors are being subsidized by others.

In brief, virtually every recommendation for a policy change or for continuation of an existing policy, has implications regarding the distribution of property and, as such, economists are disqualified from objectively making any recommendations whatsoever on the ground of efficiency. Recommendations on this basis have indeed been made in the area of cable copyright liability.<sup>27</sup>

Economic analysis can be useful in comparing the efficacy of alternative systems of property, given guidance as to the goals of public policy. Economists assume that economic actors pursue their own material well-being as best they can, given the constraints imposed by markets and ultimately by property law, and this assumption permits predictions of what the conduct of these participants will be under different systems of incentives as devolving from alternative systems of property.

A second important deficiency of economic analysis is that it tends to deal only with costs and benefits that are quantifiable; that is, deals only with transactions that take place in the "market." To return to our previous terminology, economics deals with transactions involving property to the exclusion of exchanges involving non-proprietary value. To the extent that non-proprietary value is of key importance (for example, the pursuit of national unity), economic analysis may do more harm than good unless it is carefully conceived and its limitations are candidly acknowledged.<sup>28</sup>

Given these general remarks regarding the limited authority of economics to make pronouncements on economic issues, let us now take a closer look at three important questions as they pertain specifically to the field of television programs. The three questions are:

- "What should be produced?"
- "How much should be produced?"
- "Who should pay?"

### What to Produce?

Economists shy away from qualitative factors. Thus Harvey Levin, for example, writes an economics text book on the American television broadcasting industry and warns the reader in a **footnote** as follows:

I fully recognize that available measures of program type diversity and program composition among major informational and entertainment categories entirely ignore the issue of quality. I have not attempted to distinguish low-cost and possibly low-quality from high-cost and possibly high-quality programs. Readers are therefore alerted to the absence of quality weights in all quantitative measures in this study.<sup>29</sup>

The economists' unconcern over, or inability to cope with, issues of program quality can be positively harmful when it is recognized that there are social implications devolving from market transactions and that property is not synonymous with **total value**. In dealing with communications policy, (as opposed to copyright), it is the qualitative aspects that come to the fore, rather than the quantitative.

Viewing certain programs may have harmful social implications: foreign programming may erode our sense of nation;<sup>30</sup> violent programming may decrease social order;<sup>31</sup> programming depicting sexual or social stereotyping may contribute to repression;<sup>32</sup> pornography may erode morals and empathy between the sexes;<sup>33</sup> advertising many generate greed and lack of intimacy one for another.<sup>34</sup>

With customary wit John Kenneth Galbraith has commented upon the limited usefulness of economic analysis in addressing such questions:

The manufacture of canvas, paint or pigment is a worthy concern of the

economist; anything that lowers the cost of these commodities or expands their output contributes to economic goals. But the quality of the painting as distinct from the paint has never been thought a proper concern of the subject.<sup>35</sup>

The tools of economic analysis do not really permit the economist to deal with, or even to take into account, such issues. Such being the case, economists have no reliable answer to the question "what to produce?"

#### How Much to Produce?

Just as economists have difficulty in providing objectively truthful answers to the question "What to produce?", so too are they unqualified to answer objectively the question "How much to produce?" The anticipated response to the latter question is the following:

The efficient production of a good requires that it be produced if the total benefit is greater than the total cost and that it be produced up to the point where an additional unit imposes greater costs than the benefit created.<sup>36</sup>

Such a response begs the questions as to how "total benefit" and "total cost" can be determined; without such information no real guidance has been given by the foregoing maxim.

In the case of television programing "total benefit" is impossible to measure insofar as television programing is a public good paid for not by viewers (at least not directly) but rather by advertisers or through taxation. No data regarding consumer demand are forthcoming from this state of affairs.<sup>37</sup> All that can be measured on the demand (benefit) side are valuations placed on advertising time by advertisers who have their own particular motives in funding television broadcasting.<sup>38</sup>

Even if a viewers' demand schedule could be measured, there would still exist important reasons for questioning its validity as being indicative of "total benefit." First, valuations of output depend upon the distribution of income; different income distributions will give different demand schedules and hence different measures of "total benefit.". There is no reason for believing that the existing distribution of income is "optimal." Second, viewing television, irrespective of the programming material, is felt by some to have addictive qualities.<sup>39</sup> If this is so, it would be inappropriate to treat total viewing (or even payments made for viewing under a pay television system) as "benefits."<sup>40</sup> Certain program types may be harmful, although quantification of these deleterious factors is probably impossible. Consequently, estimates of benefits based on empirical demand schedules will tend to be overstated.

### Who Should Pay?

Once again, traditional economic analysis can provide few unambiguous answers. It is agreed that viewers themselves should not pay the full charge due to the public good aspect of television programming discussed previously. But, it is so agreed that "alternatives to direct-user payments, such as taxes or higher prices for other goods, may themselves produce inefficiencies ... [since] they may only imperfectly reflect the values that consumers place on additional quantities of the good."<sup>41</sup> The conundrum of efficient pricing is increased when, as we have just argued, the very notion of consumer sovereignty is rejected as the sole basis for efficiency in television program selection and distribution.

Although traditional economic analysis can give few unambiguous answers as to how much television programming should be produced, of what qualitative nature, and who should pay, nonetheless it can still provide some useful insights into less all-encompassing questions, as we hope to demonstrate in subsequent chapters.

### SUMMARY

This chapter has analysed the relationships between value and property generally, and between copyright and communications

policy specifically. Furthermore, it has highlighted the limitations of economic analysis in dealing with questions of value residing outside the sphere of property law. Economics concentrates on market forces which, by definition, occur only within a system of property. Consequently economic analysis largely excludes non-proprietary value from consideration. In dealing with communications policy, however, we are concerned first and foremost with non-proprietary value.

## NOTES

1. Communications policy itself has two major strands. The first is cultural policy, designed to stimulate the production and distribution of indigenous intellectual creations in an effort to contribute to national unity and related goals. The second is telecommunications policy, which is designed to set in place modern and efficient means of distributing any and all messages.
2. C.B. Macpherson, "Liberal-Democracy and Property" in C.B. Macpherson ed., **Property: Mainstream and Critical Positions** (Toronto: University of Toronto Press, 1978) p. 206; and Charles Reich, "The New Property" in *Ibid*, 188.
3. The utilitarian philosopher, Jeremy Bentham, observed: "Property and law are born together, and die together. Before laws [including common laws] were made, there was no property; take away laws, and property ceases." Jeremy Bentham, **Principles of the Civil Code** (1980), extracted in C.B. Macpherson, ed., **Property: Mainstream and Critical Positions** under the title "Security and Equality of Property", p.52.
4. Adam Smith, the father of modern economics, observed:  
But man has almost constant occasion for the help of his brethren, and it is vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and show them that it is for their advantage to do for him what

he requires of them... It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity, but to their self-love, and never talk to them of our own necessities, but of their advantages."

Adam Smith, *Wealth of Nations* (Harmondsworth: Pelican, 1970), pp. 118-119.

5. However, as noted immediately, the claim is not absolute: Reputation may be eroded if the facts bear witness to derogation of character.
6. Morris Cohen "Property and Sovereignty" in Macpherson, *Property: Mainstream and Critical Positions*, p. 167. Also Walter Lippmann, *The Public Philosophy* (New York: Mertar, 1955), pp. 90-96; and Richard Posner, *Economic Analysis of Law* (Boston: Little Brown, 1972).
7. See Jacques Ellul, *The Ethics of Freedom* (Grand Rapids: Wm. B. Eerdmans, 1975), pp. 199-201. Also, Christopher Lasch, *The Culture of Narcissism* (New York: Norton, 1978); Daniel Bell, *The Cultural Contradictions of Capitalism* (New York: Basic Books, 1976).
8. James W. Carey, "Harald Adams Innis and Marshall McLuhan," in Raymond Rosenthal, ed., *McLuhan: Pro and Con* (Baltimore: Penguin, 1969), pp. 275,280.
9. A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, p.3.
10. John Shelton Lawrence, "Copyright Law, Fair Use, and the Academy: An Introduction" in John Shelton Lawrence and Bernard Timberg, eds., *Fair Use and Free Inquiry: Copyright Law and the New Media*, p.4.
11. C.B. Macpherson, 'The Meaning of Property", p. 4.
12. Morris Cohen "Property and Sovereignty" in MacPherson, *Property*, p. 159.
13. Warren J. Samuels, "Interrelations Between Legal and Economic Processes," *Journal of Law and Economics*, XIV (October 1971) 2, p.440.
14. *Ibid.*

15. *Ibid.*
16. C.B. Macpherson, "The Meaning of Property," p. 13.
17. Morris Cohen "Property and Sovereignty," p. 162.
18. William G. Shepherd, *The Treatment of Market Power: Antitrust, Regulation and Public Enterprise* (New York: Columbia University Press, 1975), p. 74.
19. Morris Cohen, "Property and Sovereignty," p. 152.
20. *Ibid.*, p. 163.
21. See Warren J. Samuels, "Interrelations Between Legal and Economic Processes" for an extended treatment of this issue.
22. John Stuart Mill, *Principles of Political Economy With Some of Their Applications to Social Philosophy* (1848), extracted in C.B. Macpherson, *Property: Mainstream and Critical Positions* under the title "Of Property", p. 83.
23. R.H. Tawney, "Property and Creative Work" in Macpherson, *Property: Mainstream and Critical Positions*, p. 136.
24. Note the explicit wording of the 1968 Broadcasting Act: "Broadcasting [should] ... safeguard the cultural, political, social and economic fabric of Canada."
25. Daniel Bell, "The Social Framework of the Information Society," in Michael L. Dertouzos and Joel Moses, eds., *The Computer Age: A Twenty-Year View* (Cambridge, Mass: MIT, 1979), and Fritz Machlup, *Knowledge: Its Creation, Distribution and Economic Significance Vol. 1.: Knowledge and Knowledge Production* (Princeton: Princeton University 1980).
26. Adolf A. Berle and Gardner C. Means, *The Modern Corporation and Private Property* (New York: Harcourt, Base and World, 1957); also John Kenneth Galbraith, *The New Industrial State* (Boston: Houghton Mifflin 1967).
27. S.J. Liebowitz, *Copyright Obligations for Cable Television: Pros and Cons* (Ottawa: Consumer and Corporate Affairs, 1980).
28. Economists do sometimes try to quantify the qualitative through shadow prices, a process that attempts to impute to non-proprietary value prices that would exist were such value to become property. Such imputation is only as sound as the criterion lying behind the imputations. See, for example, Samuel B. Chase, ed., *Problems in Public Expenditure Analysis* (Washington: Brookings, 1968).

29. Harvey J. Levin, *Fact and Fancy in Television Regulation: An Economic Study of Policy Alternatives* (New York: Russell Sage Foundation, 1980), p. 15, n. 25.
30. Harold A. Innis, *Empire and Communications*; (Toronto: University of Toronto Press, 1972); K. Nordenstrong and Herbert I. Schiller, eds., *National Sovereignty and International Communication* (Norwood; N.J.: Ablex, 1979).
31. Ontario Royal Commission on Violence in the Communications Industry, *Report, Vol. I: Approaches, Conclusions, and Recommendations* Toronto: Queen's Printer for Ontario, 1977).
32. George P. Elliot, "The Enemies of Intimacy," *Harper's Magazine* (July, 1980).
33. Ralph Heintzman, "Liberalism and Censorship," *Journal of Canadian Studies* (Winter 1978-79).
34. Daniel Bell, *The Cultural Contradictions of Capitalism*.
35. *Economics and the Public Purpose* (Boston: Houghton Mifflin, 1973), p. 61.
36. S.J. Liebowitz, *Copyright Obligations for Cable Television: Pros and Cons*, p.3.
37. Attempts have been made to estimate demand employing CATV subscription prices and penetration rates. See John McGowan and Merton Peck, "Estimating Consumers' Valuation of Additional Programming from CATV Data," mimeographed, unpublished, undated; also William Comanor and Bridger Mitchell, "Cable Television and the Impact of Regulation," *Bell Journal of Economics and Management Science* Vol 2 (1971).
38. Erik Barnouw, *The Sponsor: Notes on a Modern Potentate* (Oxford: Oxford University Press, 1978).
39. Marie Winn, *The Plug-In Drug* (New York: Viking, 1977); Jerry Mander, *Four Arguments for the Elimination of Television* (New York: Morrow Quill, 1978).
40. Note the remarks of Tibor Scitovsky in this regard: "Many comforts are satisfying at first, but soon become routine and taken for granted. Consumer demand for them remains undiminished, but the original motivation, the desire for additional satisfaction, is replaced by a new and very different motivation of wishing to avoid the pain and frustration of giving up a habit to which one has grown accustomed." Scitovisky, *The Joyless Economy* (New York: Oxford University Press, 1976), p. 137.

41. Stanley Besen, Willard Manning Jr., and Bridger Mitchell, "Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem", *Journal of Law and Economics* 21 (April, 1978), 83.

## CHAPTER 3

# Property Rights in Broadcasting

*by Robert E. Babe*

### INTRODUCTION

Property law is a system of formal rules helping to structure market forces. Because of the interdependence of claims to property, property rights can seldom be absolute. Instead rights are apportioned through the legislative and judicial processes among the members of society.

Through government, society as a whole has an interest in the outcome of economic activity. Because government has a role in the apportionment of rights to property and therefore of property itself, the apportionment of such rights must give due consideration to the goals of society. One of the goals of society is to achieve equity and fairness for the individual members of the unit.

For broadcasting, social goals have been specified in the **Broadcasting Act**:

(a) Broadcasting undertakings in Canada make use of radio frequencies that are public property and such undertakings constitute a single system, herein referred to as the Canadian broadcasting system, comprising public and private elements.

(b) The Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.

(c) All persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned.

(d) The programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonably balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources.

(e) All Canadians are entitled to broadcasting service in English and French as public funds become available.

(f) The national broadcasting service [CBC] should contribute to the development of national unity and provide for a continuing expression of Canadian identity.

(g) The regulation and supervision of the Canadian broadcasting system should be flexible and readily adaptable to scientific and technical advances.<sup>1</sup>

A consensus has developed in recent years that the goals enunciated in the **Act** have not been adequately achieved by the broadcasting system as it functions at present.

Note, for example, the following extract from an important public announcement of the Canadian Radio-television and Telecommunications Commission (CRTC):

Recent evidence suggests that at least 68% of the total viewing of English-language programs done by the average Canadian is devoted to watching foreign-produced programs. When news, public affairs, and professional sports is removed, 90% of viewing is devoted to foreign-produced entertainment programs. With the exception of the Canadian Broadcasting Corporation, Canadian English-language broadcasters offer audiences virtually no Canadian entertainment programming in peak viewing periods and next to no Canadian drama - light or serious - at any period in their schedules. It should be noted that this is largely a phenomenon in English-language broadcasting; the situation is not as serious in regard to French-language programs where large audiences are attracted to Canadian French-language entertainment programs. However, the Commission considers that there is still a need for continuing improvement in French-language programs.<sup>2</sup>

To the extent that the goals set for broadcasting in Canada are not being met under the current system of property, consideration should be given to adjusting the system of property. Adjustments in the system of property may induce the conduct of industry participants to become more closely aligned with the goals set for broadcasting. Changes in the system of property should be undertaken within the constraints of fairness to all parties.

One important component of property law in Canadian broadcasting is copyright law. Copyright is certainly not the sole component, but its importance should not be minimized.

Because of its importance to broadcasting, copyright law presents itself as a candidate for property revisions.

Copyright law should be reviewed in any event in view of the significant technological changes which have occurred since 1924. The fact of these technological changes is alone sufficient reason to assess current legislation in order to assure that equity is served. Nonetheless, we emphasize that, given the failure of the broadcasting system to fulfill the goals set for it, a review of copyright legislation at this time is propitious.

This chapter reviews briefly the performance of the Canadian broadcasting system, and then proceeds to describe and analyze the current system of property. The analysis of property includes, but is not limited to, a review of copyright law. We will then be positioned for an in depth analysis of copyright issues in subsequent chapters.

### CANADIAN TELEVISION PERFORMANCE

Evaluating the performance of Canadian television broadcasting depends in the first instance upon the criteria used for evaluation. Industry members will tend to concentrate on financial factors while government policy-makers are generally more concerned with programming activities. The two elements of finance and programming are related. Superior financial performance indicates that more can be done in the programming area while improved performance may detract from financial performance.<sup>3</sup> The trade-off between financial and programming performance is a consequence of the relatively high profitability of American programming for Canadian broadcasters. The ensuing sections of this chapter analyze the performance of the cable television industry and private sector Canadian television broadcasting. Then follows a brief discussion of the programming performance of the Canadian broadcasting system in the light of the criteria specified in the *Broadcasting Act*.

### CABLE TELEVISION ECONOMICS

Cable television in Canada began in Nicolet, Quebec in 1950. Early systems were established predominantly in towns and

villages where television signals were received only with difficulty. Today cable television is very much an urban phenomenon achieving penetration rates of 80 to 90 percent in some metropolitan areas. Indeed, the majority of Canadians now subscribe to cable television.

Key indicators describing the development of the Canadian cable television industry are displayed in Tables 1 and 2. In 1967, only 516,000 households subscribed to cable, representing about 10 percent of Canadian households. Furthermore, only 25 percent of Canadian households had available the option of subscribing to cable since cable plant did not pass the remaining households. The popularity of cable TV, even at that time, is apparent, however, from the high penetration or subscription rate of over 40 percent of households for which cable was available.

By 1979, the industry had matured to the extent that 4.1 million or 54 percent of Canadian households subscribed to cable television. Moreover, by 1979, 78 percent of the homes in Canada had available the option of subscribing to cable, of which 59 percent subscribed.<sup>4</sup>

During the period 1967-1979, revenues increased by 1327 percent from \$22.1 million to \$314 million, while the pre-tax return to capital (comprised of earnings to equity capital and interest to debt capital) increased by 2300 percent, from \$3.2 million to \$76.9 million.

Cable television has become a highly profitable industry. Accompanying the increase in cable penetration rates from about 40 percent in 1967 to 69 percent in 1979, the pre-tax return on invested capital (net fixed assets) rose from 10 to 23 percent.

The cable television industry has been approaching maturity rapidly in the last few years. It is unlikely, given the state of the art technology and current CRTC procedures in dealing with cable, that cable television availability will extend much beyond 80 percent of Canadian households, for example. Estimates indicate that 30 to 40 subscribers per mile are required for cable systems to break even at current rates.<sup>5</sup> Therefore, a

profit maximizing cable company would not voluntarily extend service into less densely populated areas unless some regulatory *quid pro quo* were forthcoming.

Elsewhere the reward to capital (profits plus interest payments) accruing to the cable industry in excess of the amounts required to attract new investment capital has been estimated. It was concluded that "surplus" earnings of the cable industry were about \$20 million before tax in 1977 and \$29 million before tax in 1978.<sup>6</sup> That is, copyright payments from the cable industry could have totalled \$29 million in 1978 without detracting from cable industry growth or necessitating increases in subscriber rates. Alternatively, cable rates to subscribers could have been reduced by \$29 million (or by about 11 percent) without causing a decline in new investment.

#### PRIVATE TELEVISION ECONOMICS

Table 3 depicts the rates of return on investment accruing to the private television broadcasting industry over the period, 1969-1979. Rates of return are before tax and are defined as earnings plus interest over net fixed assets plus working capital. The figures for return in private television broadcasting are several orders of magnitude greater than those earned by the cable industry and, moreover, are also greater than required to attract new investment into television broadcasting.

Elsewhere I estimated the reward to capital (profits plus interest payments) accruing to the private sector of Canadian television broadcasting in excess of the amounts required to attract new investment capital. It was concluded that the "surplus" earnings of the industry were \$42 million in 1977 and \$50 million in 1978, (about 37 percent of total revenue in 1978).<sup>7</sup>

TABLE 1  
CANADIAN CABLE TELEVISION INDUSTRY DEVELOPMENT  
1967-1979 SUBSCRIBER DATA

	<u>1967</u>	<u>1969</u>	<u>1971</u>	<u>1973</u>	<u>1975</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
Subscribers	516,484	923,811	1,398,469	2,115,866	2,860,937	3,417,223	3,727,293	4,084,198
Potential Subscribers along Wireline Facilities	1,225,410	1,699,749	2,681,346	3,715,009	4,233,221	5,051,360	5,570,710	5,881,453
Canadian Households	5,034,000	5,514,000	5,779,000	6,266,000	6,703,000	7,022,000	7,320,000	7,558,000
Percent Penetration	42.1	54.3	52.2	57.0	67.6	67.6	68.1	69.4
Percent Households in Canada as Cable Subscribers	10.3	16.8	24.2	33.8	42.7	48.7	50.9	54.0
Percent Canadian Households with Cable Available	24.3	30.8	46.4	59.3	63.2	71.9	74.7	77.8

Sources: Statistics Canada, *Cable Television*, annual, cat. no. 56-205, and Statistics Canada, *Household Facilities*, annual, cat. no. 64-202.

TABLE 2  
TELEVISION PROFITABILITY 1967-1979  
(In thousands of dollars)

	<u>1967</u>	<u>1969</u>	<u>1971</u>	<u>1973</u> <sup>1</sup>	<u>1975</u> <sup>1</sup>	<u>1977</u> <sup>1</sup>	<u>1978</u> <sup>1</sup>	<u>1979</u> <sup>1</sup>
Total Operating Revenue <sup>2</sup>	22,115	37,853	67,794	103,997	158,769	229,595	269,811	313,081
Operating Expenses <sup>2</sup>	13,507	23,162	37,667	52,943	81,956	216,433	145,644	180,999
Depreciation	5,234	6,603	13,459	20,974	32,227	42,701	48,760	55,611
Net Operating Income Before Tax (including interest)	3,374	8,088	16,668	30,080	44,586	60,461	75,407	79,127
Net Fixed Assets at Year-end	34,145	71,659	103,507	148,661	200,777	269,810	311,900	348,863
Rate of Return on Net Fixed Assets	9.9	11.3	16.1	20.2	22.2	22.4	24.2	22.7

Notes:

1. Excludes systems with under 1,000 subscribers for 1973-1979  
2. Operating Revenue and expenses include "other revenue" and  
"other expenses"

Source: Statistics Canada, *Cable Television*, annual, cat.no. 56-205

TABLE 3  
PRIVATE TELEVISION BROADCASTING PROFITABILITY  
1969-1979  
(In thousands of dollars)

	<u>1969</u>	<u>1971</u>	<u>1973</u>	<u>1975</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>
Total Operating Revenue	106,574	115,790	170,747	233,571	330,978	403,465	472,541
Operating Expenses	76,502	92,060	126,107	178,210	247,341	299,088	348,971
Depreciation	6,984	8,258	9,281	11,200	14,103	15,490	17,058
Net Operating Income Before Tax (including interest)	23,088	15,472	35,359	44,161	69,534	88,887	106,512
Net Fixed Assets at Year-End	43,314	47,739	58,590	91,785	115,993	122,296	139,176
Estimates of Working Capital	13,835	12,813	19,493	22,705	38,466	38,878	55,236
Rate of Return on Net Assets Plus Working Capital Before Tax	40.4	25.6	45.3	38.6	40.5	55.1	54.8

Notes:

1. Working capital estimated by prorating total for radio and television by ratio of television revenues to revenues accruing to radio plus television.
2. Rate of return defined as earnings plus interest before tax over net fixed assets plus working capital.
3. Operating revenues and expenses include "other revenues" and "other expenses" respectively, and "adjustments" for years subsequent to 1971.

Statistics Canada, Radio and Television Broadcasting, (annual cat.no. 56-204).

Source:

### PUBLIC TELEVISION ECONOMICS

The Canadian Broadcasting Corporation is a non-profit, Crown corporation financed primarily through government transfers. As such, the CBC does not earn a rate of return.

The relative importance of public broadcasting in Canada has been in steady decline since the early 1960's. Whereas in 1967, the CBC's revenues of \$130 million accounted for 42 percent of all cable, television and radio broadcasting revenues, by 1978 CBC revenues, \$468 million, accounted for only 36 percent of all broadcasting system revenues. Revenues in the private sector of television broadcasting increased by 279 percent between 1969 and 1978; revenues of the CBC increased by only 130 percent over the same period.<sup>8</sup> Over much of the period the Corporation has increased its output of program hours significantly, despite a shrinking budget in constant dollars.<sup>9</sup>

### TELEVISION PROGRAMMING PERFORMANCE

We will now turn to a discussion of the programming performance of the private and public sectors of television broadcasting. While it is true that the cable industry engages in program originations, some of a valuable and innovative nature,<sup>10</sup> the fact remains that the primary function of cable television is to rediffuse broadcasting signals, not to originate programming. (In 1979 the cable industry spent \$20.3 million on programming, about 6.5 percent of revenues.<sup>11</sup>). While we concentrate here on programming of television broadcasters, due to the relatively greater importance of the latter, this emphasis should not be interpreted as derogating the value of local programming by cable companies.

It is not necessary to examine the programming performance of Canadian television broadcasters in minute detail since this has been the subject of previous studies.<sup>12</sup> But, it is important to consider some fundamental questions. One of the most fundamental questions is the relative performance of the private and public sectors.

In 1978 private television broadcasting received revenues of \$403 million of which programming expenses accounted for 176 million (44 percent). These programming expenditures were comprised of procurement of foreign programs, production costs of advertisements, and production costs of Canadian television programs. The budget allocated specifically to Canadian programs is not publicly available. However, it has been estimated that only about 40 percent of private television broadcasters' program budgets, or about 14 percent of revenues, are devoted to Canadian program productions (about \$70 million in 1978).<sup>13</sup>

The CBC in 1978 had a total budget of \$518 million, of which approximately 80 percent was devoted to programming, compared to 44 percent for the private sector. Of the CBC's program budget, about 78 percent is devoted to television operations, and the remainder goes to radio, both domestic and international.<sup>14</sup> On the basis of these percentages, the television program budget of the CBC in 1978 would have been about 323 million. An essential point to note is that the public and private sectors of Canadian television broadcasting have revenue bases of almost identical magnitude, and in that sense the two sectors are comparable. These data are summarized in Table 4.

Having noted the funds made available for programming by the public and private sectors of Canadian television broadcasting, we turn now to the expenditure of these funds. Canadian programming on private stations and networks is comprised almost exclusively of low employment and low complexity endeavours such as game shows, news and public affairs, and sports. Canadian programming on the CBC is much more diverse and includes high quality drama and comedy. Such differences in programming strategies between private and public broadcasters are reflected in employment statistics. During the period from 1975-76 to 1977-78, the number of prime time ACTRA assignments on the CTV network declined by 30 percent, from 1704 to 1278. The number of prime and non-prime time assignments fell from 3830 to 2750<sup>15</sup>. CTV and its private affiliates provide annually only 6 percent of the total income of ACTRA performers.<sup>16</sup> By contrast, the CBC is Canada's largest patron of the arts, bringing before Canadian audiences about 30,000 Canadian artists, musicians, commentators, actors and performers each year. The CBC also supports symphony

ALLOCATION OF REVENUES  
CANADIAN TELEVISION BROADCASTING 1978

	PRIVATE SECTOR	CBC
Revenues and Expenses	Thousands of Dollars	% of Revenues
	Thousands of Dollars	% of Revenues
Revenues	403,465	100.0
Program Expense	176,459	43.7
Other Operating Expenses	132,831	32.9
Pre Tax Return of Capital Depreciation interest, earnings	94,175	23.3
		32,500
		8.0

Source: Statistics Canada, Radio and Television Broadcasting 1978, p. 17; A.W. Johnson "Reflecting Canada and the Regions", Canadian Forum (February 1977).

Note: CBC television receives 80% of the Corporation's budget.

orchestras, ballet companies, and other valuable endeavours which would have difficulty surviving without its support.<sup>17</sup> The Corporation is the source for about 47 percent of the total income of ACTRA performers.<sup>18</sup>

Public and private broadcasters differ with respect to scheduling. Canadian programs on private stations and networks tend to be scheduled during time periods when the potential audience is lowest. During the hours of 7 pm to 9:30 pm, when the potential audience is greatest, Canadian content on private stations averages 10 to 15 percent. Moreover, Canadian content on private stations is concentrated in the summer months when potential audience is lowest.

By contrast, the CBC devotes about 60 percent of the hours between 7 pm and 9:30 pm to Canadian productions in the fall and winter, with a lower proportion in the summer months. Overall, Canadian prime time productions account for 70 percent of the CBC's fall and winter schedule between 6 pm and midnight, compared to 40 to 50 percent on private television.<sup>19</sup>

Much of the Canadian programming of private stations and networks does not appear to be favoured by audiences. In November 1977, for example, 47 percent of the hours broadcast by CTV were Canadian-originated, but such programming accounted for only 29 percent of CTV's total viewing hours; in the case of Global, 41 percent of the program hours were Canadian, but such programming accounted for only 19 percent of Global's total viewing hours. Canadian independents broadcast an average 39 percent Canadian content, but such Canadian programs accounted for only 18 percent of such stations' total audience. By contrast, 63 percent of the schedule on CBC-owned and operated stations was Canadian and such programming accounted for 64 percent of these stations' total audience.<sup>20</sup>

In light of the foregoing, we accept as accurate the following conclusion expressed in a report published by the CRTC:

The private, off-air broadcaster, particularly in the English sector, continues to seek regulatory protection

while contributing, in the main, the absolute minimum to Canadian content and at the same time, reaping ever-increasing profits from the system.<sup>21</sup>

### INDEPENDENT PRODUCTIONS

It has been remarked widely that few Canadian independent productions receive distribution on Canadian networks and stations. The CBC in recent years has been taking steps to help remedy this perceived deficiency in Canadian broadcasting.

The difficulty faced by independent producers is shown by the following statistics. In 1975-6, the CTV Network devoted only 6 1/2 hours to independent productions out of a total of 1200 hours of original programming. CTV in that year also presented 30 hours of direct co-productions with independent producers.<sup>23</sup> By 1978-79, no time was devoted to either independent productions or to direct co-productions.<sup>24</sup> Within CTV itself, production is carried out primarily by only two of the fifteen full affiliates, namely CFTO-TV Toronto and CFCF-TV Montreal.<sup>25</sup>

There are a number of possible reasons for the paucity of independent productions on Canada's largest private network. Since private Canadian stations have financial incentives to broadcast only low-cost and low complexity programs,<sup>26</sup> it makes financial sense for the broadcaster himself to produce all the Canadian programs. In a study prepared for the Department of Communications, Professors Lapointe and Le Goff concluded that the type of programming sought by private Canadian broadcasters, whether quiz and game shows or public affairs, is of a production genre analogous to the news productions which "are preferably produced within the organization on account of the responsibility involved."<sup>27</sup> Therefore, "the independent production sector does not have specific technical advantages when it comes to this type of production." Furthermore, "because of its small size it (the independent producer) cannot share the risks with the broadcaster, an arrangement which might encourage the broadcaster to use its products."<sup>27</sup>

A number of other factors may also be of significance in explaining the reluctance of private broadcasters to use independent productions. First, because CRTC licensing practice requires that broadcasters own extensive production facilities, some of the costs to their own production houses of studio time and labour are fixed as overhead and need not be allocated to the costs of any particular program. This is not the case of course for the independent producer. Secondly, vertical integration may reduce the risk of bankruptcy to the program producer and will ensure a steady supply of Canadian programming to the broadcaster who must meet the CRTC's regulatory content quotas.

Thirdly, vertical integration allows broadcasters to participate in the profits from successful Canadian programs, without any need to share profits ("rents") with a non-integrated producer. Such programs may be used to cross-subsidize unsuccessful Canadian programs.

Finally, contractual arrangements between the broadcaster and his integrated production house (which are unlikely to be true arm's length arrangements) may permit the broadcaster to underestimate profits and thus request less onerous regulatory demands.

#### CABLE RIGHTS IN BROADCASTS

The financial and programming performance of the Canadian broadcasting system is an outcome in part of the existing system of property rights. Legislation pertaining to property (and regulatory decisions dealing therewith) are means whereby society pursues its goals. It is the task of the consultants to ascertain whether or not existing property rights respecting broadcast rediffusion (as given in the present **Copyright Act** and judicial interpretation thereof, and in the **Broadcasting Act** and regulatory decisions pertaining thereto) provide appropriate or sufficient market stimuli for the pursuit of the goals proclaimed in the **Broadcasting Act**. Furthermore, we are to determine whether the **Copyright Act** should indeed be used to provide such stimuli, and to make recommendations regarding appropriate modifications to the **Copyright Act**, as well as policy alternatives. Section 3(a) of the **Broadcasting Act** declares that

"broadcasting undertakings in Canada make use of radio frequencies that are public property ..." Section 3(c) of the same **Act** states that the right of freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned." Section 17(5) of the **Copyright Act** declares that "Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright..."

The public property nature of the radio frequency spectrum has meant that broadcasters do not have a proprietary right in their diffusion of broadcast signals, irrespective of program content. Therefore, individuals and cable components alike are not required to pay compensation for reception of electronically radiated signals.

Moreover, judicial interpretations of the **Copyright Act** have held that no copyright exists in a broadcast per se. Therefore, cable television companies may rediffuse broadcast signals to subscribing households without copyright liability if and when such programs are rediffused simultaneously with over-the-air transmissions.

There are three legal cases worth noting pertaining to these matters. In **Canadian Admiral Corporation v. Rediffusion, Inc.** (1954) Ex. C.R. 362, Mr. Justice Cameron held that a television broadcast had to constitute a "public performance" in order to qualify for copyright protection. While it was agreed that the broadcast of a film indeed constituted a "performance", it was also held that, insofar as the intended audience was comprised of subscribers in homes and apartments, viewing the program for private enjoyment, it did not constitute a performance "in public". The argument that a large number of private viewers could collectively constitute a "public" audience was rejected on the grounds that "the character of the individual audiences remains exactly the same; each is private and domestic, and therefore, not 'in public'".<sup>29</sup>

In **Warner Bros. Seven Arts Inc. et al v. CESM-TV Ltd.** (1971) Ex. Ct. January 25, 1971, Mr. Justice Cattanach ruled that, while broadcasts as such are not protected by copyright, "material contained in the broadcasts may be protected by copyright, but the protection attaches only to that material and not to the broadcast."<sup>30</sup> Consequently, the videotaping of programs by a cable television system (in this particular case as it happened, for subsequent rediffusion to subscribers) constituted unauthorized replication by a "contrivance by means of which the work may be mechanically performed."<sup>31</sup>

Finally, in **Capital Cities Communications Inc. et al v. Canadian Radio-Television Commission et al** (1975), the Federal Court of Appeal affirmed the power of the CRTC to order or permit deletion of commercial messages contained in broadcasts originating in the United States and being distributed in Canada by cable television systems. In his judgement, Mr. Justice Thurlow stated:

The appellants [Capital Cities Communications] have no proprietary or other legal rights in their signals in Canadian air space. The radio frequencies in that space are public property under Section 3(a) of the Broadcasting Act. When the appellants put out signals on any of such frequencies, they make use of the public property in the frequencies but they do not by so doing acquire any right either in the frequency or the signals they have generated on it, and they have no right to have their signals received in Canada in any form, whether altered or unaltered. Nor have they any right to require that the licence of a Canadian broadcasting receiving undertaking [cable television system] conform to their requirements or demands.<sup>32</sup>

The decision of the Federal Court of Appeals was upheld by the Supreme Court of Canada on November 30, 1977.<sup>33</sup> While this case and its appeal did not pertain directly to copyright liability on the part of cable companies for program rediffusion, it is of significance that both courts held that it is lawful for cable systems to remove commercial content associated with the

broadcast of copyrighted television programs, or at least such programs originating in the U.S., notwithstanding the fact that it is this commercial content that gives value to the broadcaster in his licence to broadcast copyrighted materials. It is also significant that the Supreme Court of Canada quoted approvingly from the U.S. **Fortnightly case**:

Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set ...

If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a co-operative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users, but by an entrepreneur.<sup>34</sup>

Nonetheless, although cable television companies bear no legal liability for copyright on broadcast programs rediffused simultaneously with the originating broadcast, they cannot make unfettered use of broadcast signals. Restraints on the uses that can be made of broadcast material have been promulgated by the Canadian Radio-television and Telecommunications Commission, and it is important to note some of these restrictions.

First, cable television companies may not rediffuse broadcast signals without permission of the CRTC. The Commission has stated that it will generally approve cable rediffusion of all U.S. stations available over-the-air to the majority of the population in the service area of the cable company. But, it will normally not approve carriage of two or more stations affiliated with the same U.S. network even if such duplicate channels are available off-air. For cable systems employing distant head-ends and microwave to receive U.S. signals, the cable systems are generally authorized only to redistribute the three U.S. commercial networks and PBS.<sup>35</sup> With regard to distant

Canadian signals "it is the Commission's general policy to restrict the authorization...to stations which cable operators can receive over-the-air at their local headend."<sup>36</sup>

Secondly, under provisions contained in a 1971 policy statement, cable systems with at least 3,000 subscribers must, at the request of a local television station, delete the programming of a U.S. station (or a distant Canadian station) where such program duplicates simultaneously the programming of the local station.<sup>37</sup>

Thirdly, by a policy statement issued in 1971, broadcast signals rediffused by cable television companies are to be unaltered, except in those instances where cable companies have entered into contractual arrangements with Canadian broadcasters to insert replacement advertisements or other "suitable material" into the times occupied by advertisements on American stations, such substitute advertisements being sold by Canadian television stations.<sup>38</sup> "Suitable material" does not include commercials sold by cablevision companies themselves. This policy, however, has been implemented only in isolated instances, due in part at least to pressures at the political level by American broadcasters and the U.S. government. Although the majority of cable systems have installed the requisite equipment for commercial deletion and substitution, only a tiny minority of such systems have undertaken this activity. Indeed, on January 21, 1977, the CRTC announced that, in response to a request from then Communications Minister Hon. Jeanne Sauvé, and in order to allow time for the Supreme Court of Canada to make a finding on the legality of commercial deletion and substitution, the CRTC was postponing further implementation.<sup>39</sup> On November 30, 1977, the Supreme Court ruled that the CRTC indeed possessed the power to order and/or approve commercial deletion, and that cable companies were acting legally in obeying this order, at least as regards signals originating in the United States.

Fourthly, through its 1971 policy statement on cable television, the CRTC stated that it was of the view that cable television systems should offer compensation payments to over-the-air broadcasters for the economic use made of their programs. Insofar as this policy is very germane to the topic at

## NOTES

1. **Copyright in Canada** is a very useful source of information on copyright practices in other national jurisdictions. On the public lending right, see pp. 118-23.
2. See the Canadian Bar Association brief to Consumer and Corporate Affairs, filed Nov. 30, 1979, pp. 7-13 and James Lahore, **Copyright** (Sydney, Australia: Butterworths, 1977). Former Counsellor to the World Intellectual Property Organization, Lahore observes categorically that "neither the Berne Convention nor the Universal Copyright Convention recognized a copyright in television and sound broadcasts." (p. 15).
3. For a discussion of the apparently inequitable treatment given Canadian interests under the U.S. Copyright Royalty Tribunal's administration of rediffusion licensing, see, above, chapter 7, **Administrative and Regulatory Issues**.
4. On the origin of copyright in early Jewish and in Roman law, see Edward J. Ploman and L. Clark Hamilton, **Copyright** (London: Routledge & Kegan Paul, 1980), pp. 6-8.
5. **Copyright in Canada.** p 107.

States. The CRTC's policy of simultaneous program substitution could be enlarged to include non-simultaneous substitution/deletion. However, using CRTC regulation rather than copyright law to achieve this objective may not be a wise choice from the perspective of Canada-U.S. relations. The United States may be more prepared to see program substitution/deletion as a disinterested attempt to protect economic rights if it emanated from copyright law than if it emerged from the policy of the CRTC, whose motives could be perceived to be solely nationalistic and protectionist.

Finally, it is important to recognize that the right to rediffuse is only one of several broadcast rights which require the protection of Parliament. Keyes-Brunet recommend that the "originating broadcasting organization" of "Canadian broadcasts" be granted:

- a) the right to record the sounds and/or images broadcast;
- b) the right to use such a recording for:
  - (i) broadcasting or diffusing
  - (ii) causing the broadcast to be heard or seen in public
- c) the right to rebroadcast the broadcast.<sup>5</sup>

The technological revolution associated with the development of the videodisc may bring about some enormous changes in the ways in which broadcasts will be used. The dramatic cost reductions associated with videodiscs suggest the possibility of enormous new secondary markets for broadcasts. For certain kinds of broadcasts, the videodisc market might compete in size with the secondary transmission or cable market. Even if many of the extravagant predictions of videodisc growth fail to materialize, the Government of Canada may need to consider establishing a licensing scheme specifically geared to the videodisc industry. Since the protection of broadcasts may require enumerating several specific rights and may also require separate compulsory licensing schemes for rediffusion and for videodisc, an equitable, organized, and non-chaotic solution requires such protection to be located within copyright law.

Nonetheless, the CRTC has had difficulty in implementing its policy pertaining to compensation payments. It may well be that the CRTC no longer believes it has the power to order such payments under existing law.

It is worth noting that both Rogers Cable TV, in its application to acquire control of Canadian Cablesystems, and Canadian Cablesystems in its application to acquire Premier Communications, provided for an allocation of 1 percent of gross cable revenues to finance broadcast repeat channels and to provide interim financing for Canadian feature films and independently-produced television programs. In this latter regard, Cablesystems stated that such funding "allows the cable participants to assist the production of competitive Canadian programming, while, at the same time, allowing the contributors to determine, in some measure, how the money is to be spent."<sup>41</sup>

The practices adopted by Canadian Cablesystems, however meritorious they may be, are not akin to copyright payments. In financing one or more broadcast repeat channels, Cablesystems is paying for the right to replay material previously rediffused without payment, and such payments are required under the existing **Copyright Act** as interpreted in **Warner Bros.-Seven Arts V. CESM-TV**. Cablesystems is not making payments for simultaneous rediffusion. Furthermore, insofar as this cable television company is allocating funds to create new programming, owned and controlled (in part) by itself, there is no similarity to copyright payments. Copyright payments would be made for the use of existing programming procured from other sources.

To summarize, cable companies are permitted under existing legislation to distribute, without compensation to copyright holders, broadcast programs to subscribing households. Current legislation (as opposed to regulatory policy) does not preclude cable companies from removing commercial content associated with the broadcast of such programs, at least in those instances where the programs are broadcast from the United States, and inserting commercial messages or other material in their stead. Current legislation precludes videotaping of programs whether for subsequent rediffusion or otherwise in the absence of contractual

agreement between the cable company and the broadcaster or copyright holder.

Regulatory policy has served to circumscribe somewhat those property rights existing in legislation, however. Cable companies must attain regulatory approval before rediffusing of any broadcast signal. Regulatory practice has been to limit rediffusion to signals that can be received off-air and to a maximum of three non-duplicated U.S. commercial signals and one PBS station in those cases where such reception is unavailable off-air.

Distant stations must be deleted, at the request of a local broadcaster, during periods of simultaneous duplication of program material.

Cable companies may not insert their own commercial messages into the advertising time of television stations; furthermore, the regulator's policy of commercial substitution with advertisements sold by local broadcasters in place of advertisements sold by distant (U.S.) stations, is not being practised to any significant extent.

Finally, cable companies have not undertaken (with possibly one or two exceptions) to follow regulatory guidelines of compensating local broadcasters, either for the use made of their signals or for any perceived financial harm inflicted on them by the importation of distant signals, or both. Nevertheless, in a few instances, pursuant to regulatory guidelines, cable companies do purchase from broadcasters rights in copyrighted material produced by the broadcaster to repeat programming (advertisements intact) aired previously; such companies dedicate a channel or channels to this purpose.

#### OTHER CABLE PROPERTY RIGHTS

Cable television service is provided in Canada through local monopolies. Not only are cable companies so enfranchised by the CRTC, but in addition, current contractual arrangements and technological characteristics also serve to preclude direct competition. It is worthwhile noting briefly the effects of

technological and contractual aspects upon the monopolistic structure of the industry.

The provision of cable television service entails the establishment of a cable network characterized by high fixed capital costs and relatively low variable, or per subscriber, costs.<sup>42</sup> These costs and technological characteristics mean that it is most efficient that all local cable television services be provided through one cable plant (which need not necessarily be dedicated only to the provision of cable service, however). Any form of direct competition that would encompass widespread duplication of plant and equipment would prove to be wasteful and could well result in losses accruing to one or all of the companies involved; direct competition would erode the subscriber base and hence revenues of the hitherto monopolistic system, but would not reduce costs commensurately.

Current ownership and contractual arrangements preclude competition in the provision of cable service insofar as the large portion of the plant and equipment utilized (which, as argued above, cannot be efficiently duplicated) is at present dedicated through ownership and contractual arrangements to exclusive use of single companies for the purpose of providing local cable service.<sup>43</sup> Significant portions of cable plant are frequently owned by telephone companies and leased on an exclusive basis to cable companies; otherwise, the plant is owned outright by cable companies themselves.<sup>44</sup> While it has been suggested that all plant and equipment put to use for the purpose of providing cable television service be encompassed within a "single integrated network," owned by the telephone companies and leased out on a common carrier basis for provisioning of various services, including cable and telephone service, such arrangements have generally not been implemented except in isolated instances, such as in Elie, Manitoba, thereby precluding competition in the provision of cable service.

It is apparent, then, that the monopoly enjoyed by the members of the cable industry stems from law, including contract law, and from explicit regulatory policy. Monopoly is an outcome, but only in part, of technological considerations, since, as argued above, it is conceivable that different

ownership and contractual arrangements and different regulatory policies, could provide for a greater measure of competition, even given the aforementioned cost and technological considerations.<sup>45</sup> Telephone companies, for example, if not so precluded by law or regulation, might choose to offer cable service.

In addition to monopolistic service provision, cable television systems possess several other characteristics frequently associated with public utilities.<sup>46</sup> The service is provided through a permanent, physical connection between the producer and the consumer, as are electricity, telephones, water, and so forth, raising the possibility of undue price discrimination among subscribers since there is no possibility of resale of services. Moreover, cable television is associated with the fields of transportation and communications as are most public utilities. Finally, cable television has a special importance in the lives of many Canadians. As noted by Wood Gundy Ltd. "cable service is looked on almost as a necessity by those who are subscribers; in difficult economic times, cable would be one of the last services to be cancelled by the household".<sup>47</sup> The foregoing characteristics of the cable television industry may well have been instrumental in causing the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty (Clyne Committee) to recommend that cable companies "should be regulated on a rate-of-return basis."<sup>48</sup>

Nonetheless, cable television has been declared categorically by the CRTC not to be a public utility and hence is not subject to the same types of constraints normally imposed upon public utilities. Rather, the cable industry is declared to be a "hybrid",<sup>49</sup> falling between the two regulatory stools of broadcasting and telecommunications carrier.

As a component of the broadcasting system, cable television is in a number of respects treated by the regulator in a manner analogous to the regulator's treatment of traditional broadcasters: its profits are unregulated; it is licensed for a fixed period of time only, subject to renewal. In practice, licence renewals, although frequently subject to public hearing,

tend to be automatic.<sup>50</sup> But, on the other hand, cable systems are not subject to regulation respecting minimum quotas of Canadian content, the principal focus of the CRTC regulation of broadcasters.

And while, like public utilities, cable is enfranchised on a monopoly basis and its rates are subject to approval by the regulatory board, unlike public utilities, cable companies are not expected to extend service to unprofitable areas through the principles of cost averaging and cross subsidization. Nor are cable profits regulated directly. While the regulator has declared jurisdiction over rates and published numerous criteria by means of which cable rates are judged, rate of return regulation or other direct profit regulation has not been invoked.<sup>51</sup> Finally, and notwithstanding its ability to distribute messages from various sources, cable has not been declared to be a common carrier. It is permitted to (and indeed required to) originate its own messages, although being precluded from carrying advertising sold by itself or charging directly for such programming.<sup>52</sup>

#### PROPERTY RIGHTS IN BROADCAST SIGNALS

The **Broadcasting Act** declares that "radio frequencies are public property." All broadcasting transmitting undertakings, that is all undertakings which transmit radio signals for direct reception to the general public, must obtain a licence from the Canadian Radio-television and Telecommunications Commission and a technical operating permit from the Department of Communications.<sup>53</sup> The CRTC is empowered to grant licences for periods not exceeding five years, subject to renewal, if in the opinion of the Commission, the "objects" of the Commission will be furthered thereby. The objects of the Commission are specified in Section 3 of the **Act** and pertain *inter alia* to the broadcast of predominantly Canadian programming material.

There are two major reasons why the government has maintained itself or, in more recent years, delegated to an independent governmental regulatory board, the responsibility for licensing. The first reason concerns the technical characteristics of the radio frequency spectrum; the second concerns the ideology or

philosophy pertaining to broadcasting in Canada. We expand on each of these factors.

First, broadcast signals have certain characteristics which dictate that the allocation of frequencies be carried out by an administrative body, rather than through the exchange of private property rights in the marketplace. The radio spectrum "has many attributes of common property (shared use) resource."<sup>54</sup> Here we will note two of these attributes. First, the spectrum is not depleted through use, as are many other resources, but it is "subject to degradation and pollution which stem from congestion and intolerable interference."<sup>55</sup> These factors create problems in efficient use of the radio resource.<sup>56</sup>

While it has indeed been argued in some quarters that private property rights could and indeed should be created and supported through law,<sup>57</sup> in practice it seems unlikely that "property rights can be defined with sufficient clarity to make them marketable",<sup>58</sup> and in any event, "transactions costs" among the various affected parties could be high. This is not to say that user charges or other market-simulation mechanisms may not be appropriate as an adjunct to administrative allocation, however.

Furthermore, in addition to non-depletion (but degradation) through use in transmission, the radio spectrum also bears the characteristic of a public or common good in reception. Once radio signals are radiated, they are available for reception by all those with the appropriate receiving equipment who are located within the geographic coverage pattern of the signal.<sup>59</sup> Difficulties in controlling reception of satellite signals at present point to the common property nature of radio reception. It is for this reason that broadcasting tends not to be funded through direct market mechanisms whereby viewers and listeners pay according to use,<sup>60</sup> but rather through general taxation in the case of public broadcasting, advertising in the case of public and private broadcasting, or taxes on receiving equipment in some countries.

It can be argued that exclusion from reception through user payments, in addition to being costly (for example, costs entailed in scrambling and descrambling equipment, billing,

monitoring and so forth), are also undesirable insofar as the marginal cost associated with additional reception of transmissions is zero.<sup>51</sup> On the other hand, program originators must receive funding from some source in order to be induced to create programming in the first place, and it can be argued that a user-pay mechanism would give greatest support to viewer tastes.<sup>62</sup> In addition to questions concerning the extent to which market-based decision making is appropriate in the Canadian context (a point we return to immediately), it is to be noted that user-pay television, to the extent that it were to become a major mode of financing programming, would worsen the distribution of income in our society by discriminating against those unable or unwilling to pay.

In addition to the public property nature of the radio spectrum, there is an additional reason why Canadian law has precluded private property rights in radio frequencies. Broadcasting in Canada has been cloaked historically with a social purpose. Broadcasting has been viewed by legislators as a powerful cultural conditioner which, if unregulated, could, *inter alia*, erode Canadian nationhood through undue concentration on American-originated program material.

Consequently, broadcasting licences are to be issued only to those groups which, in the opinion of the CRTC, can and will contribute to the fulfillment of the objectives proclaimed for broadcasting in the **Act**. In furtherance of the **Act's** objectives, the CRTC was given substantial powers in addition to making initial awards of licences for periods of up to five years. It was granted the powers to renew and not renew licences, and to revoke licences for cause. It was empowered to attach conditions to licences and to amend such conditions. It was empowered to enact regulations respecting programming and other matters to which all licensees and/or licensees of a particular class of licence must adhere. It was empowered to file suit in the courts for failure on the part of licensees to comply with regulations.

To summarize, Canadian law permits the allocation of publicly-owned radio frequencies to private use for a limited period of time upon the condition that the frequencies so

allocated be utilized to help fulfill the aims set for broadcasting, namely that broadcasting in Canada should help "safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada." In order to facilitate and help ensure compliance with these ends, Canadian law has provided for the creation of an independent supervisory body with broad-ranging powers.

In order to gain further insight as to the existing system of property, it is therefore necessary to turn to the policies of the supervisory body, namely the Canadian Radio-television and Telecommunications Commission. The policies of the CRTC have been described and analysed at length by one of the present authors in previous studies,<sup>63</sup> and therefore only a brief summary of findings is presented here.

With regard to program content, the CRTC requires that 50 percent of the hours between 6 p.m. and 12 midnight be devoted to Canadian-originated material, and that over the full broadcast day (6am to 12 midnight), 60 percent of the broadcast hours be devoted to Canadian content; these quotas are averaged over the full broadcast year.<sup>64</sup> Within these constraints, most licensees are free to choose programming from whatever source and to schedule such programming according to their own inclinations.<sup>65</sup>

With regard to commercial content, licensees are constrained to a maximum of 12 minutes per hour. Commercial content is also subject to some government control, especially pertaining to food, drug and other such products, and is subject to legislation designed to limit "misleading advertising." Canadian content quotas are applied to commercial content also.

With regard to the licensing of radio frequencies, it is the policy of the Commission to grant new licences for periods of up to five years to parties adjudged best prepared to fulfill the aims set for broadcasting; competitive applications are generally requested in the case of new licence issues. Respecting licence renewals, it is the policy of the Commission to issue renewals for up to five years for licensees deemed to have provided adequate or superior performance, and for less than five years for licensees deemed to have provided inadequate

performance. It is not the policy of the Commission to hold competitive applications for renewals nor to fail to renew licences. With regard to transfers of licence, it is the policy and practice of the CRTC to admit as applicant the party proposed by the vendor only, not to intervene in financial negotiations reached between the buyer and seller, and to approve the great majority of transfer applications.

Furthermore, certain corporate groups, namely telephone companies and chartered banks, are precluded from holding broadcasting licences. On a number of occasions, the Commission has also expressed concern regarding undue concentration of control of media and cross ownership among cable, broadcasting and newspapers, although at present, its policies in these regards are unclear.<sup>67</sup> Broadcasting licences in Canada through Order-in-Council may be held only by Canadian citizens and corporations.

The market forces stemming from the current system of property, when combined with audience preferences, have meant that the goals proclaimed in the **Broadcasting Act** have proved illusive to attain.

#### SUMMARY

Market forces take on shape and slope only within the structure set by property law. In the broadcasting field, an important component of the system of property is copyright legislation. To the extent that the performance of the broadcasting system is inadequate, copyright legislation becomes a candidate for revision in order to restructure market forces so as to improve performance.

From a financial point of view, the private sector of Canadian broadcasting is performing very well; rates of return accruing to private television broadcasters are several times those required to attract new capital, while the cable industry too earns well above the cost of capital.

Nonetheless, the programming performance is inadequate. This inadequacy becomes especially conspicuous when comparisons are made between the private and public sectors, each having comparable financial resources.

## NOTES

1. Part of section 3 of the **Broadcasting Act** 1968, R.S.C. 1970, C.B-11, as amended.
2. CRTC, "Public Announcement: Canadian Content Review," (December 31, 1979). See also Robert E. Babe, **Canadian Television Broadcasting Structure, Performance and Regulation** (Ottawa: Minister of Supply and Services for the Economic Council of Canada, 1979); Anon, **Broadcasting and Telecommunications: Past Experience, Future Options** (Ottawa: CRTC, 1980).
3. Note that this statement is precisely the opposite of that which economists are prone to make. Economists generally assume that good financial performance is an outcome of good non-financial performance, monopolies excepted.
4. Calculations based on data from Statistics Canada, **Cable Television**, catalogue number 56-205, annual, and Statistics Canada, **Household Facilities**, catalogue number 64-202, annual.
5. Robert E. Babe, **Cable Television and Telecommunications in Canada: An Economic Analysis**, p. 58.
6. Robert E. Babe and Philip Slayton, **Competitive Procedures for Broadcasting - Renewal and Transfer, A Report Prepared for the Department of Communications**, Ottawa, and available upon request from the Department, September 1980, pp. VI-II to VI-12, and also pp. IV-2 to IV-25. See also Stylianos Perrakis and Julio Silva - Echinique, "The Profitability and Risk of CATV Operations in Canada," paper prepared for the

Department of Communications, Ottawa, 1980, and Harvey J. Levin, *Fact and Fancy in Television Regulation: An Economic Study of Policy Alternatives*, 102-130.

7. Babe and Slayton, *Competitive Procedures for Broadcasting*, pp. VI-11 and V1-12; also pp. IV-2 to IV-25. See also Stuart McFadyen, Colin Hoskins and David Gillen, *Canadian Broadcasting: Market Structure and Economic Performance* (Montreal: Institute for Research on Public Policy, 1980); Perrakis and Silva-Echinique, "The Profitability and Risk of Television Stations in Canada"; and Levin, *Fact and Fancy in Television Regulation*, pp. 102-130.
8. Calculations based on CRTC, *Special Report on Broadcasting in Canada 1968-1978*, Vol. 1, (Ottawa: Minister of Supply and Services, 1979) Statistics Canada, *Radio and Television Broadcasting*, annual; Statistics Canada, *Cable Television*, annual.
9. Bruce McKay, *The CBC and the Public: Management Decision Making in the English Television Service of the Canadian Broadcasting Corporation, 1970-1974*, Ph.D. thesis, Stanford University, 1976, pp. 83-84.
10. Jean McNulty, *Other Voices in Broadcasting: The Evolution of New forms of Local Programming in Canada*, Report Prepared for the Department of Communications, Ottawa, 1979.
11. Statistics Canada, *Cable Television*, annual.
12. Babe, *Canadian Television Broadcasting*; Anon, *Canadian Broadcasting and Telecommunications: Past Experience, Future Options* (Ottawa: Minister of Supply and Services for the CRTC, 1980); Canadian Council of Filmmakers, *CTV Network Ltd.*, intervention prepared for submission to the CRTC on the subject of the application for renewal of the network licence, January 17, 1979.
13. Canadian Cablesystems Limited, *Submission to the CRTC on Canadian Content Review*, July 1980, p. II-8. It could be argued that Canadian Cablesystems is not the most reliable source for data pertaining to broadcasters' expenditures on Canadian programming insofar as cable companies and television broadcasters are rivals in regulatory proceedings. Nonetheless, the fact that the foregoing estimates are contained in a submission to the CRTC, which presumably is aware of the actual data, should serve to increase the authority of the estimates.

14. A.W. Johnson, President of CBC, "Reflecting Canada and the Regions," speech to the Men's Canadian Club of Vancouver, November, 1975, extracted in **Canadian Forum** (February 1977), p. 30.
15. Council of Canadian Filmmakers, **CTV Network, Ltd.**, intervention prepared for submission to the CRTC on the subject of the application for renewal of the network licence, 7 January, 1979, p. 22.
16. A.W. Johnson, **Touchstone for the CBC** (Ottawa: Canadian Broadcasting Corporation, 1977), p. 6.
17. Canadian Broadcasting Corporation, **Annual Reports**.
18. A.W. Johnson, **Touchstone for the CBC**, p. 6.
19. Babe, **Canadian Television Broadcasting**, pp. 75-79, 198-210.
20. Canadian Broadcasting Corporation, **The CBC's Programming Services**, submitted to the CRTC in support of the applications for renewal of network licences, May 1978, p. 144.
21. Anon, **Canadian Broadcasting and Telecommunications: Past Experience, Future Options**, p. 35.
22. Hugh Edmunds et al., **A Study of the Independent Production Industry with Respect to English Language Programs in Canada with Recommendations for Policy Action**, Vol. 1. (Windsor: Centre for Communications Studies, University of Windsor, 1976); Alain Lapointe and Jean-Pierre Le Goff, **L'Industrie de la Production d'Emissions de Télévision** (Ottawa: Department of Communications, 1980); Babe, **Canadian Television Broadcasting**, pp. 84-86.
23. Edmunds, **A Study of the Independent Production Industry**, Vol. 1, p. 95.
24. Canadian Council of Filmmakers, **CTV Television Network Ltd.**, intervention of CCFM to the CRTC on the subject of the application for renewal of the network licence, January 17, 1979, p. 27.
25. **Ibid.**, p. 29.
26. See especially Babe, **Canadian Television Broadcasting Structure**, pp. 49-99.
27. Alain Lapointe and Jean-Pierre Le Goff, "Summary-Canada's Television Program Production Industry", available from Department of Communications, Ottawa, May ,1980, p. 8.
28. **Ibid.**

29. See Communications and Information Services Division, Department of Consumer, Corporate and Internal Services, Government of Manitoba, **Broadcasting and Cable Television: A Manitoba Perspective** (Winnipeg: 1974), pp. 25-27.
30. A.A. Keyes and C. Brunet, **Copyright in Canada: Proposals for a Revision of the Law**, p. 106.
31. Warner Bros. - Seven Arts Inc. et al v. CESM-TV Ltd (1971) 65 C.P.R. 215 at 241, quoted in **Broadcasting and Cable Television: A Manitoba Perspective**, p. 27.
32. Quoted in CRTC, **Annual Report 1974-75**, p. 27. It is not clear from the foregoing whether the same rights regarding commercial deletion and substitution would pertain to signals originating in Canada.
33. In the Supreme Court of Canada, **Capital Cities Communications Inc., Taft Broadcasting Company and WBEN, Inc. -and-Canadian Radio-Television Commission**, November 30, 1977.
34. **Fortnightly Corporation V. United Artists Television, Inc. (1968)**, 392 U.S. 390, opinion of Stewart J., quoted in judgement of Mr. Justice Bora Laskin, in The Supreme Court of Canada, **Capital Cities Communications Inc. et al v. Canadian Radio-Television Commission et al.** It is important to note that Mr. Justice Fortas set forth a vigorous dissenting opinion in **Fortnightly**, holding cable systems do indeed "perform" the material picked up and distributed. Furthermore, subsequent to the decision, the U.S. Congress enacted new copyright legislation making cable systems liable for copyright payment. See Chapters VI and VII *infra*.
35. CRTC, "Public Announcement: A Review of Certain Cable Television Programming Issues", March ,1979, pp. 15-18.
36. *Ibid.* p. 19.
37. CRTC, "Policy Statement on Cable Television: Canadian Broadcasting, 'A Single System'", 16 July, 1971. The present requirement regarding non-simultaneous duplication represents a modification from the policy originally proposed by the Commission, that non-Canadian programs transmitted by Canadian broadcasting stations and rediffused by cable television were not to be duplicated on the cable system either simultaneously or within seven days of broadcast by the Canadian station. See CRTC, "Public Announcement: Guidelines for Applicants Regarding Licences to Carry on CATV Undertakings," April 10, 1970.

38. CRTC, "Policy Statement on Cable Television: Canadian Broadcasting, 'A Single System'" July 16, 1971.
39. CRTC, "Public Announcement: Commercial Deletion," January 21, 1977.
40. CRTC, "Policy Statement on Cable Television: Canadian Broadcasting 'A Single System'", July 16, 1971.
41. Canadian Cablesystems Limited, *Application for Control of Premier Communications Limited*, (1980), p. 78.
42. Babe, *Cable Television and Telecommunications in Canada*, pp. 9-59.
43. Geographically dispersed systems may employ common head ends and microwave links to defray costs to individual systems.
44. See Robert E. Babe, "Public and Private Regulation of Cable Television: A Case Study of Technological Change and Relative Power", *Canadian Public Administration* (Summer, 1974) for a perspective on the relative property rights accruing to cable and telephone companies from these arrangements. Generally, it is the policy of the CRTC that cable companies have the option of owning most of the plant utilized in their operations, the most notable exception being cable systems located in the Province of Manitoba.
45. The competition would be of the form of the "value-added carriers" in the US telecommunications industry.
46. See James Bonbright, *Principles of Public Utility Rates* (New York: Columbia, 1961), p. 8, and Charles Phillips, *The Economics of Regulation* (Homewood: Irwin, 1969), p. 4.
47. Wood Gundy, Ltd. "Progress Report: The Cable Television Industry," February 26, 1975.
48. *Telecommunications and Canada*, p. 21.
49. CRTC, "Public Announcement: A Review of Certain Cable Television Programming Issues", 26 March, 1979, p. 9.
50. See Babe and Slayton, *Competitive Procedures for Broadcasting*.
51. CRTC policies respecting cable television rates and extension of service are discussed in greater detail in Babe, *Canadian Television Broadcasting Structure, Performance and Regulation*, pp. 130, 163-168.
52. Although it is quite conceivable that cable television companies will be authorized to offer pay-per-channel services in the near future.

53. Cable television systems, termed in the legislation "broadcasting receiving undertakings", must also obtain licences in order to rediffuse these broadcast signals. However, MATV systems (master antennas) and household antennas are not so licensed.
54. Harvey J. Levin, **The Invisible Resource: Use and Regulation of the Radio Spectrum** (Baltimore: John Hopkins Press, 1971), p. 29.
55. *Ibid.* p. 6.
56. *Ibid.*, pp. 29-30.
57. R.H. Coase, "The Federal Communications Commission" **Journal of Law and Economics**, 2(October 1959), William H. Meckling, "Management of the Frequency Spectrum", **The Radio Spectrum: Its Use and Regulation**, (Washington: Brookings, 1968), pp. 26-34.
58. William K. Jones, "Use and Regulation of the Spectrum: Report on a Conference", *Ibid.*, pp. 71-115; and Levin, **The Invisible Resource**, pp. 85-117.
59. Point to point communications, for example microwave transmissions, do not bear this characteristic, however.
60. Scrambling of signals may cause unauthorized reception to be more costly to the viewer than contracting with the program originator for a descrambling device.
61. Paul A. Samuelson, "Public Goods and Subscription TV: Correction of the Record", **Journal of Law and Economics** (1971).
62. Jora Minasian, "Television Pricing and the Theory of Public Goods", **Journal of Law and Economics** (1971).
63. Babe, **Canadian Television Broadcasting**; Babe and Slayton, **Competitive Procedures for Broadcasting**.
64. Higher quotas pertain to the CBC during prime time hours.
65. This freedom may be circumscribed in those cases where stations have been licensed on the basis of unique Promises of Performance.
66. Over the period 1968-1980 the CRTC has failed to renew or revoked four licences, none on grounds of programming performance. See C.C. Johnston, **The Canadian Radio-television and Telecommunications Commission**, draft study for the Law Reform Commission of Canada, 1979, p. 2-83.

67. Robert E. Babe, "Empires in TV Land", *In Search/En Quête* (Winter, 1980); also Robert E. Babe, "Concentration of Control in the Canadian Cable Television Industry", *Regulatory Reporter*, Canadian Law Information Council, 1 (1980), pp. E53-E65.

## CHAPTER 4

# Some Economic Issues

*by Robert E. Babe*

### INTRODUCTION

The primary purpose of this study is to assess from the point of view of Canadian communications policy the Keyes and Brunet recommendations for instituting a copyright in the rediffusion of broadcasts. Keyes and Brunet, it will be recalled, recommended that a revised **Copyright Act** should give copyright protection to Canadian **broadcasts** incorporating Canadian program material and that a Copyright Tribunal be created to, *inter alia*, "fix the appropriate fees and establish the necessary safeguards to ensure equitable assessment, collection and distribution of royalties to Canadians."<sup>1</sup>

An assessment of Keyes-Brunet implies, however, a prior assessment of the suitability of copyright legislation *per se* to pursue communications policy, given our mandate. Some might argue that copyright law is an inappropriate means of pursuing the same, and yet could favour (or oppose) Keyes-Brunet on other grounds. Furthermore, if it is determined that copyright is indeed a suitable means of pursuing communications policy, an assessment of the efficacy of Keyes-Brunet in comparison with alternative proposals is in order.

We argued in Chapter 2 that the effects of copyright legislation on communications policy must be considered by policy-makers because copyright legislation will indeed have an effect - perhaps perverse or perhaps supportive but nevertheless an effect there will be. Perhaps policy-makers, after reviewing copyright, will opt for goals other than communications policy, (perhaps ensuring high rewards to all creative producers or placating foreign interests) if such goals are in conflict with communications policy. But the point remains that communications policy must enter the decision-making process as there will be an effect.

The position of the consultants is that copyright legislation should be made to harmonize as much as possible with all the aims of society, that if society has conflicting goals these should be specified and the trade-offs recognized. In any event there is no inherent or a priori reason why copyright law should not be used to aid the pursuit of communications policy, any other functions of copyright notwithstanding. All property rights have both individual and social consequences.

The following section of this chapter addresses some key economic issues pertaining to the general topic of cable copyright liability for rediffusion of broadcasts: monopoly, incidence, equity, financial impact of cable on broadcasters and copyright holders, and incentives from cable copyright liability. Other economic issues, such as financial need and ability to pay, programming performance and so forth were treated in Chapter 3.

After a discussion of the concept of monopoly and of other key issues in economics, the chapter turns to the specific Keyes-Brunet recommendations with respect to a rediffusion right. The chapter compares the proposals found in **Copyright in Canada** with those of the Economic Council and with those of the Clyne Committee.

### ECONOMIC ANALYSIS OF SOME CABLE COPYRIGHT ISSUES

#### Monopoly

To some, copyright is perceived as a "monopoly" right bestowed upon creators of certain types of works. Once copyright is declared to be a form of monopoly, classical restraints and abuses can easily spring to mind and thereafter it is but a short step to policy recommendations designed to remove such alleged restraints on competition.<sup>2</sup>

Not infrequently in economic analysis as elsewhere the conclusion reached is dependent to a significant extent upon the assumptions and perceptions existing before the analysis is even begun.<sup>3</sup> Therefore, if one begins to analyse the economic aspects of copyright from the point of view of the theory of monopoly, one is almost foreordained to arrive at the conclusion that copyright protection should not be strengthened and, indeed, should be weakened. On the other hand, if the problem is approached from the point of view that copyright is a property right in no significant way different from other property rights, one will judge the issue in the context of the efficacy of the market forces generated from the right and in the context of the contribution of the right to the broader objectives of society. We begin this section, therefore, by discussing the validity of the characterization of copyright as monopoly.

Monopoly, even in its most blatant examples, is seldom perfect; there are nearly always substitutes.<sup>4</sup> Neither is competition ever perfect; there nearly always exist some unique characteristics in products or in sellers. What is at issue in employing the terms "monopoly" and "competition" is the extent to which other goods, services, sellers and so forth are substitutes for the good, service or seller in question.

Economists frequently employ the term "cross elasticity of demand," and even deign to attempt measurement thereof, to denote the degree to which competition exists.<sup>5</sup> Furthermore, they look at profit rates earned<sup>6</sup> and barriers to entry into an industry<sup>7</sup> in order to determine whether significant degrees of monopoly power are present.

With regard to television programming, however, with perhaps a few notable exceptions, it is highly improbable that monopoly power exists to any degree that could be termed problematic. Competition exists at three distinct levels.

Television viewing is certainly a popular activity of many Canadians; it is asserted, for example, that viewing television occupies more of the leisure time of North Americans than any other activity except sleeping.<sup>8</sup> Part of the popularity of viewing television is attributable to the low price entailed in such activity.<sup>10</sup> Nonetheless, it is possible to overstate the monopoly aspects of television programming. Canadians do, on occasion, tear themselves away from their television sets, indicating that television viewing still faces some competition from other activities despite the low price of viewing. Moreover, while television stations are authorized at present to occupy exclusively particular frequencies to present a schedule of programs, it is a rare occurrence that a television station does not face some direct competition for the viewers' time from other stations receivable in the same locality, in addition to competition from other leisure time pursuits. In major markets, competition among eight or more stations is no longer unusual, and the number of outlets is growing annually.

Furthermore, programs must also compete for viewer attention with programs offered on the same station at other times, as well as with programs competing both simultaneously and at other times on competing stations. It is also apparent to everyone that especially popular programs and formats tend quickly to spawn imitators in significant volume, a manifestation of competition at work.<sup>10</sup>

In any event, to the extent that, despite the foregoing observations, the monopoly question is still held to be problematic, it is to be noted that in the years to come it will certainly become less so. Cable capacity is in principle unlimited, and we are witnessing the formation of new satellite-cable networks offering specialized channels of news, children's programming, pay television, "superstations," and so forth. In the context of these developments, the monopoly question pales into insignificance.

Therefore, association of the law on copyright with the term "monopoly," as regards television program production at least, is unwarranted. The term "monopoly" should be applied only to important classes of goods or services offered by single sellers for which there are few good substitutes - for example telephone, electricity and indeed cable television service.<sup>11</sup>

It is true that, at present, the supply of Canadian-originated programs tends to be concentrated within a few major production houses; however, this state of affairs is not in the least attributable to copyright, but rather it results from ownership links among television networks, stations and production houses (vertical integration) and the foreclosure of independent productions resulting therefrom.<sup>12</sup>

For the foregoing reasons, we dismiss claims pertaining to the alleged monopolistic restraints inherent in copyright protection of television programs.<sup>13</sup> Rather, copyright should be viewed in the context of property law as developed in Chapter 2 and assessed as to whether the existing system of rights permits society to "realize the purposes of its members or some of the purposes of some of its members".

#### Incidence of Cable Copyright Liability

An important question concerns who would bear ultimately the burden of cable copyright liability - cable companies or cable subscribers or both. For insight into this issue, it is necessary to return to the cost and demand aspects of cable television.

While cable television apparently suffers from diseconomies of scale with regard to geographic extent (that is, past some minimal optimal size cable television costs increase disproportionately with increases in size),<sup>14</sup> nonetheless, cable systems experience significant economies of density. The marginal cost of adding subscribers to a system of given geographic proportions is lower than average cost per subscriber.<sup>15</sup>

Evidence has also been developed which indicates that, at prices charged by cable television companies (year 1975), demand

is slightly elastic; that is, an increase in prices would decrease revenues.<sup>16</sup> Furthermore, evidence has been developed indicating that, in 1975, marginal revenue per subscriber (at \$28.00 per year) was somewhat less than marginal cost (at \$33.00 per year) on average.<sup>17</sup> Presuming that econometric analysis and the data base used in these studies permit conclusions to be drawn to this degree of accuracy, (an assumption that is not necessarily valid) the findings indicate that cable television systems (at that time) were not maximizing short run profits, a state of affairs that may be attributable, in part, to the fact that the CRTC must approve all increases in cable rates.

The simplest way to invoke copyright liability on cable companies would be through compulsory licensing whereby the copyright fee is based on a percentage of gross cable revenues. This fee could be depicted diagrammatically as a shift to the in the demand and marginal revenue schedules.<sup>18</sup> In the case of a profit maximizing monopolist under conditions of constant and increasing marginal costs, the firm will be unable to pass on to the consumer the full amount of the tax. However, insofar as some evidence exists that cable systems at present (or at least up to 1975) are not maximizing short run profits (marginal cost is greater than marginal revenue), the firms in the industry would have the potential to pass on a greater proportion of the tax than would otherwise be the case. Of course, the regulator would still have a role to play in this regard, however.

It is likely that a revenue tax for copyright would result in somewhat higher prices to consumers with a consequent diminution in cable subscriptions, but that the increase in price would be significantly less than the per subscriber tax, even in the absence of regulatory supervision over rates.<sup>19</sup> Given the existence of regulation and the fact that high rates of return are being earned currently by the industry (as we saw in Chapter 3), it becomes even more improbable, or in any event unjustifiable, that the cable industry would be able or permitted to pass on more than a portion of copyright liability payments to subscribers.

### Equity Among Viewers

It has been suggested on grounds of equity that it would be inappropriate that cable television subscribers should be required (through cable copyright liability) to pay for programming when over-the-air viewers do not pay directly for such programming.<sup>20</sup> The issue of "undue" price discrimination (equity) has received considerable airing before regulatory tribunals as regards the setting of prices for, *inter alia*, telephone service. In such proceedings it has been held that customers in substantially like circumstances should be charged the same rates for the same service. Under this criterion, different rates are charged for multiparty as opposed to single-line service, to customers located in differently sized exchanges (that is according to the number of telephones within a free-calling zone), to business vs. residential customers, and according to the time of day and day of the week that long distance calls are placed.

Under regulatory criteria of fairness, however, it is illegal to charge different rates to customers of different age, sex, race, income or occupation.<sup>21</sup> It would appear that copyright liability on the part of cable television companies would not constitute undue price discrimination if the issue were evaluated within the foregoing regulatory context. After all, cable subscribers receive much greater diversity in programming than do off-air viewers, and the act of subscribing is voluntary on their part.

It should also be borne in mind that cablevision subscribers make payments for the express purpose of receiving a greater quantity and diversity of programs than would otherwise be available. While these payments at present accrue only to companies providing the technical means of delivering the programs to the home, this fact should not misdirect our attention from the real purpose of the payment.

In the absence of program material, no one would subscribe to cable. The question then becomes whether copyright holder should be permitted to participate in existing or augmented subscription fees. This question turns, in part, upon criteria of equity

between cable companies and copyright holders as well as upon other social goals.

#### Cable's Financial Impact on Broadcasting

An issue that has been of long standing concern to the regulatory authority is the possible deleterious financial impact of cable television on over-the-air broadcasters. In 1969, the CRTC stated its view that

The rapid acceleration of such a process [namely an enlarged coverage area of U.S. networks and U.S. stations and therefore their advertising markets in Canada] ... would represent the most serious threat to Canadian broadcasting since 1932 before Parliament decided to vote the first Broadcasting Act. In the opinion of the Commission, it could disrupt the Canadian broadcasting system within a few years.<sup>22</sup>

In accordance with this perception of the possible or likely impact of cable television on the revenues of Canadian broadcasters, the CRTC developed a number of policies (not all of which have been implemented to any significant extent) designed to protect traditional broadcasters from the increased competition attributable to cable television. These policies were described in Chapter 3.

Financial harm inflicted on Canadian broadcasters by cable television could constitute one argument in support of payments on the part of cable companies to broadcasters; revised cable copyright legislation would be one mechanism for initiating such payment.

Financial harm to broadcasters is not necessarily synonymous with financial harm to copyright holders, but there is a strong correlation. First, significant portions of the schedules of television stations are often produced by the stations themselves, and to this extent broadcasters are indeed copyright holders. Secondly, to the extent that cable inflicts financial

harm on broadcasters, copyright holders too can be expected to suffer since broadcasters make payments to copyright holders for the purchase of program rights.

In any event, broadcasters purchase rights (licences) to diffuse program material from copyright holders (assuming the latter to be distinct from the former) and cable companies, without incurring liability, are free to utilize these signals in pursuit of monetary gain. If cable inflicts financial harm on broadcasters, it lowers the value of the licence to diffuse programming that has been purchased by the broadcaster from the copyright holder.

Copyright law could be used to cause cable companies to compensate directly copyright holders. Alternatively, copyright legislation could declare rights in the licence to diffuse program material, thereby requiring cable companies to compensate broadcasters. Or, copyright legislation could incorporate both of the forementioned rights and duties.

The financial impact of Canadian cable television on private sector broadcasters (as distinct from copyright holders and non-commercial broadcasters) has been the subject of two detailed analyses.<sup>23</sup> In one study (Babe), it was concluded that cable television to date (1972 data) had not caused a discernible decline in Canadian private sector broadcasting revenues and that, in fact, it may have served to increase such revenues. The other study (Liebowitz) concluded that cable television in Canada had not served to decrease prices charged for advertising time on the part of North American broadcasters and that, indeed, it may have served to cause an increase in prices charged; from this conclusion the last mentioned author inferred that cable television has benefitted financially North American broadcasters. In addition, it is to be noted that cursory examination of time series data regarding the growth of television advertising revenues and the relative monetary importance of television as an advertising medium would not support the contention that cable has harmed Canadian broadcasters. If cable indeed has not harmed private sector broadcasters, it has probably not harmed copyright holders either.

The terms of reference given the consultants includes a critical analysis of the Liebowitz study on the impact of cable on broadcasters. Detailed comments are reserved for Appendix II. As developed in the appendix, the present consultants have serious reservations with respect to Professor Liebowitz's policy recommendations.

#### Criteria for Exacting Payment

Incentives will vary in accordance with the principles used in invoking cable copyright. Two types of principles are important to consider: principles relating to criteria for payment, which is the subject of this section, and principles determining who shall be paid, the subject of the next section.

There are two basic ways in which cable companies can be required to make copyright payment: use of market mechanisms (bargaining) or use of compulsory licence. In the case of the former, cable companies would negotiate rediffusion rights with the copyright holder (either the broadcaster or the original holder of the copyright) and make payments directly to that party. In the latter case, the copyright fee for rediffusion would be predetermined in some way and paid initially to an administrative body which would then redistribute the funds to the parties concerned on some basis.

The use of market mechanisms (bargaining), it has been argued, will make it more likely that suppliers can capture the incremental value of their programs to viewers and advertisers.<sup>24</sup> In this view, the negotiating power of the program copyright holder (or alternatively the television station) will enable payments commensurate with viewer popularity. Since different prices would be negotiated for each program or series of programs (or alternatively each television station), by each cable company, and since cable companies would negotiate separately, total cable copyright payments would be maximized.<sup>25</sup>

One difficulty in using the market mechanism stems from cable's status as a local monopoly. Insofar as the party that would be procuring rediffusion rights has substantial market power vis-a-vis its subscribers, it could refuse to negotiate

rights to rediffuse some programs on stations considered valuable to some subscribers in its belief that non-carriage would not induce many subscribers to cancel the service altogether. Subscribers do not pay by the program or by the station but rather make monthly payments for the complete service, and they have no other cable alternatives from which to choose.

Furthermore, it is not at all clear that the market mechanism would contribute to Canadian communications policy. If copyright were granted to foreign as well as domestic interests, it is likely that the bulk of copyright payments would leave Canada due to the popularity of American programs and stations in Canada. If copyright were vested solely with domestic interests, the problems in nurturing meritorious but less popular programs might not be relieved and in any event cable companies might well wish to decline carriage of Canadian programs or stations in favour of the "free" and popular US alternatives.<sup>26</sup>

Finally, since cable companies would be required to contract individually with either program suppliers or stations, there would be a great deal of administrative and contractual costs in using bargaining as the means to set rediffusion payments.

The alternative, compulsory licensing, could base copyright payments on any number of criteria: revenues, profits, subscribers, number and type of signals rediffused, and so forth. If the reason for invoking cable copyright liability is primarily to enforce payment for use of signals, then payment based on the number and type of signals rediffused makes sense. On the other hand, if copyright is invoked primarily with the intent that cable should make a contribution to Canadian broadcasting, payments based on financial criteria will be more apt.<sup>27</sup> Since profits may be disguised in many ingenious ways,<sup>28</sup> copyright liability based on profitability is not workable.

The disadvantages inherent in the market approach constitute the advantages of compulsory licensing. While the total copyright payments by the cable industry could be lower under compulsory licensing, there would be less disruption in service to subscribers, less administrative difficulty and cost, and more

opportunity to employ the funds in accord with Canadian communications policy.

#### To Whom Should Payments Flow?

Cable copyright payments could be directed either to program copyright holders or to broadcasters or to both. If program copyright holders were granted the right, irrespective of nationality, American interests would be the primary beneficiaries. Private television broadcasters in Canada diffuse U.S. programming for about 50 percent of their schedules and in addition cable systems often carry 4 or more American channels for which the Canadian content is approximately zero. It would make little sense to create a rediffusion right for copyright holders if U.S. interests were to gain disproportionately, to Canadian. But, as we discuss below in Chapter 6, **Copyright, Federal-Provincial Relations and International Relations**, non-discrimination as to nationality is a prominent feature of international copyright conventions to which Canada is a signatory. If copyright for cable rediffusion is to be vested with copyright holders, a means ought to be found to give paramount consideration to Canadian interests while not discriminating as to nationality.

Alternatively, cable copyright liability payments could be directed to broadcasters. This could be done in two ways. Either a rediffusion right in the very act of transmission (as opposed to rights in the programming *per se*) could be created, or alternatively copyright legislation could explicitly confer rediffusion rights in the licence (contract) to diffuse program material which is procured from program copyright holders by broadcasters. The first approach was recommended by Keyes and Brunet; the second is implicit in the approach recommended by the Economic Council of Canada.

In either event, there are two problems inherent in any rediffusion right created for all broadcasters. The first problem concerns the flow of copyright payments out of the country as cable companies pay for the rediffusion of American stations. The second concerns the fact that copyright payments to private Canadian stations may not be that productive in

stimulating the performance of the Canadian broadcasting system; we noted in Chapter 3 that private television broadcasting is already highly lucrative but that Canadian private broadcasters have performed quite poorly in terms of programming.

#### **ECONOMIC ANALYSIS OF THREE PROPOSALS FOR CABLE COPYRIGHT LIABILITY**

##### **Keyes and Brunet Rediffusion Right**

In order to avoid "drastic increases in royalty payments to non-nationals" implicit in universal copyright rediffusion protection, the Keyes-Brunet recommend creation of a "rediffusion right" whereby "copyright protection be provided, by means of a right to rediffuse, to Canadian broadcasts incorporating Canadian program material."

This recommendation stems from the authors' conclusion that broadcasts *per se* are not subject to international copyright treaty while the program material is. By discriminating as to the national origin of the broadcast signal, and then differentiating as to the national origin of the material being exhibited on that signal, it would be possible for Canada to comply technically with her international obligations while at the same time ensuring that no copyright payments leave the country. The payments would be made through compulsory licensing.

While it remains to be specified on what basis the revenues would be distributed among broadcasters, it is clear that Canadian-originated programming would become somewhat more attractive to Canadian broadcasters (although still very much disadvantaged relative to U.S. programs), and less attractive to Canadian cable companies. Canadian program suppliers (to the extent they are distinct from Canadian broadcasters) would also benefit to the extent that they would come to share the increased revenues accruing to broadcasters.

From the point of view of Canadian communications policy, there are a number of weaknesses to the Keyes-Brunet proposals. First, there would be insufficient stimulation of Canadian

program productions. Keyes-Brunet recommend direct transfer of funds from the cable industry to the Canadian broadcasting industry without making firm provisions as to stimulating program production directly. We saw in Chapter 3 that the private sector of Canadian television broadcasting is highly lucrative with pre-tax returns on investment of over 50 percent. Despite this high profitability only an estimated 14 percent of private sector revenues are devoted to Canadian programs. The Canadian programs that are offered by private sector broadcasters are of low complexity and low employment and frequently do little by way of pursuing the goals set for broadcasting.

The consultants are not persuaded that increasing revenues to private broadcasters would significantly increase programming performance in light of the financial incentives they operate under and their programming performance to date. We do believe, however, that cable copyright payments flowing to the CBC and other public broadcasting entities in Canada would stimulate program production. This assessment is again based on the historic program performance of the CBC and its financial need.

Secondly, Keyes-Brunet propose creating in law a proprietary right in broadcast signal transmission. However, it has been a long standing principle of both broadcasting policy and more generally radio spectrum management in Canada that no private property rights are to exist in radio frequencies (see discussion in Chapter 3). While the proprietary right proposed could be made contingent upon possession of a broadcasting licence in which no private rights are enforced, nonetheless we deem as undesirable the erosion in the public property nature of the radio spectrum inherent in the Keyes-Brunet proposal.

Thirdly, and as taken up in greater detail in a subsequent chapter, Keyes-Brunet propose discrimination as to nationality; while their proposal may be in accord with the letter of international copyright conventions, it is likely to provoke international difficulties.

#### Economic Council of Canada Proposal

The Economic Council of Canada recommended that copyright payments by cable companies be required only in those instances

where commercial content was deleted by the cable companies or where the broadcast program does not contain commercials. The Council was apparently of the view that broadcasters granted these rights should receive compensation in proportion to the audience reached by the programs.<sup>29</sup>

It was noted in Chapter 3, above, that only in rare instances are commercials deleted at the present time, although given regulatory authorization cable television companies are legally empowered to delete commercials. Given the current situation, therefore, the main beneficiaries of the Economic Council's recommendations, if adopted, would be the Canadian Broadcasting Corporation, provincial educational broadcasters such as the Ontario Educational Communications Authority, and the Public Broadcasting System in the U.S. To the extent that one believes public broadcasting to be superior to advertiser-financed television in transmitting important cultural values, and to the extent that one believes the former to be under-financed and under-represented relative to the latter, the Economic Council of Canada has indeed put forth a viable policy option.<sup>30</sup>

There are a number of attractive features in the Economic Council's proposals. First, insofar as copyright fees would be directed toward non-commercial television, non-commercial television would be encouraged. This could induce and enable the CBC, for example, to cut back on its reliance on advertising; this would be welcomed by both CBC viewers and Canada's private, commercial broadcasters who could be expected to gain advertising revenues from such action. It could also lead to the establishment of new provincial educational television systems and other non-commercial broadcasting.

Secondly, insofar as public broadcasting would be the beneficiary of these payments, it would be easier to earmark such funds to specific purposes, for example independent productions if such were deemed desirable, than it would in the case of private television. Copyright payments to the CBC and provincial broadcasting entities would be directed where financial need is greatest and performance highest.<sup>34</sup>

Third, the proposal relieves the dilemma entailed in most other copyright liability schemes whereby the U.S. broadcasters

and copyright holders could be expected to be the primary beneficiaries; for most commentators located in Canada, that would be an unfortunate outcome of cable copyright liability. In the present instance, however, only PBS in the U.S. would gain from copyright liability.

Finally, the Economic Council proposal implies the creation of a copyright in the licence to diffuse (exhibit) program material as procured by the broadcaster from the copyright holder, rather than in the process of diffusion as recommended by Keyes and Brunet. We consider this advantageous from the standpoint of the public property nature of radio frequencies, a historic feature of Canadian communications policy.

The major criticism that some might apply to the Economic Council's recommendations we perceive as a benefit, namely that copyright legislation would be differentiating between public and private broadcasters. At a simplistic level of analysis it could be held that copyright should reward producers in accordance with market demand and in that sense treat all producers equally. But, we have argued at some length that market demand itself takes on shape and slope only within the framework of law of which copyright is a component. Therefore it does not make sense to set law so that market forces are given full reign when it is realized that the particular set of market forces that is in operation is an outcome of law. That is why we pointed out that law is an important means whereby society pursues its goals by adjusting market forces. However, the market forces that currently exist in the private television broadcasting sector (of which copyright is a component) are ill-suited to the pursuit of communications policy. A rediffusion right for all Canadian broadcasters would not disturb the perverse system of incentives facing private broadcasting.

Furthermore, under the present system of property private broadcasting is not characterized by financial need and granting the private sector a rediffusion right would mean little more than a transfer of funds from the cable industry to the broadcaster.

The Economic Council proposal, it is to be emphasized, does not contemplate taking something away from private television broadcasters which they now have; rather it contemplates not increasing their rights through cable copyright liability.

We turn now from the current situation in which commercial deletion and substitution is minimal to one where cable companies have full discretion as to deleting and substituting commercials, provided they compensate the rights' holder. For purposes of this discussion, we assume that copyright payments are negotiated on a per program basis. This is because compulsory licensing would be unworkable in the context of commercial deletion and substitution; as will become apparent, relative evaluations of the original commercial messages versus the substitute advertisement must be arrived at on a case-by-case basis.

Cable companies would be interested in deleting broadcast commercials and substituting ones sold by themselves upon payment of copyright liability to broadcasters in those instances where: (i) the commercial time is worth more to the cable company than it is to the broadcaster, (ii) copyright liability payments are less than advertising revenues accruing to the cable company but equal to or greater than the foregone advertising revenues (as a result of commercial deletion) of the broadcaster. As noted by Liebowitz, there is evidence that indicates that the farther a viewer is located from a television broadcasting transmitter, the less valued he is by the advertiser.<sup>31</sup> This would obviously be true in the case of local business advertisements, but may be true for other forms of advertising as well. Therefore, it is most likely that commercial deletion, substitution and copyright payments would be applied by cable companies to distant television stations that are imported by the cable company.<sup>32</sup>

This state of affairs would result in two opposing forces as regards television advertising expenditures. On the one hand, insofar as television advertising would become geographically "targeted" to a much greater degree than at present, advertising via television would become more "cost effective" in inducing sales and so advertising expenditures should rise.

On the other hand, the degree of effective competition amongst television stations becomes increased since all distant signals become truly "local" in terms of local advertising. The increased competition (or the increased supply of local advertising time) could cause advertising rates to fall, resulting in less advertising revenues overall, notwithstanding the increased effectiveness of television advertising. A factor not to be neglected in this regard, however, is the local monopoly status of cable television systems; the monopoly aspect could permit the cable company to set prices at monopoly levels (subject only to the local competition of locally-based television stations) so as to maintain and increase television advertising revenues over-all.<sup>33</sup>

It is possible to conceive of situations where commercial deletion and the ensuing copyright payments are applied to all distant signals, to U.S. signals only, and to Canadian signals only.

If commercial deletion were applicable to all stations, the primary beneficiaries would be U.S. stations and copyright holders. This is because all American stations are distant stations in the sense that they serve markets other than Canada in the first instance at least, and because 70 percent of all viewing time in English Canada is devoted to American-originated programs. It is true that Canadian cable companies, broadcasters and copyright holders would receive higher revenues in the first instance (that is, assuming to be negligible the effects of increased competition for transmission of local advertising on advertising rates and the share of local stations therein). However, it is to be expected that U.S. interests would receive an additional \$3.00 or more for each additional \$1.00 to Canadian copyright holders, based upon the foregoing viewing shares. If commercial deletion and copyright liability were applied to U.S. signals only, the proportion of additional revenues captured by U.S. interests would be even higher and none of the additional revenues would accrue to Canadian copyright holders.

If commercial deletion, substitution and copyright liability were authorized only for distant Canadian stations, Canadian

copyright holders could be expected to gain more than they would in the instances described above. And, if commercial deletion were authorized only for the Canadian portion of the schedules of distant Canadian stations, Canadian copyright holders and other Canadian interests would be the exclusive beneficiaries. The increased competition for diffusion of local advertising could lead to a greater concentration of control in Canadian broadcasting if the increased competition proved to be detrimental to the financial welfare of small nations.

Note that the foregoing discussion differs from CRTC policies regarding commercial deletion and substitution insofar as the CRTC did not envisage copyright recompense for such activity. In the absence of copyright liability, it makes sense from a pragmatic (if not a moral) point of view to delete commercials on U.S. stations; with copyright liability it makes sense to delete commercials on Canadian stations.

A policy of commercial deletion, substitution and copyright liability can be expected to be favoured by local advertisers due to the increased number of local advertising outlets, by cable companies due to their stake in the action, and by some Canadian copyright holders. It could well be favoured also by Canadian broadcasters who over-all would gain in revenues, although the increased competition could cause some stations (probably the smaller ones) to lose out in terms of local advertising in their home markets and find that they were unable to make up these losses in distant markets.

#### Clyne Committee Recommendations

Neither Keyes-Brunet nor the Economic Council of Canada offered policy recommendations concerning the market exclusivity of programming rights in the face of cable importation of distant signals, but this was the area of greatest concern to the Clyne Committee. At present, broadcasters (both networks and local stations) which are licensed to serve well-defined geographic territories, negotiate exclusive rights to broadcast program material to their territories for a specified period of time (generally one to two years); competing stations and networks are precluded from negotiating rights to broadcast the same material during the duration of the agreement.

Cable television systems vitiate these arrangements, to some extent at least, by importing distant signals into local markets and foreign signals into Canada in those instances where the distant stations have themselves negotiated exclusive rights to the program for **their** territories but have negotiated no such rights respecting the area served by the local cable system. Since current copyright legislation does not make cable systems liable for copyright liability, broadcasters find their market exclusivity of program rights lessened and copyright holders thereby may find their value in the sale of exclusive market rights reduced. The case is analogous to a publisher who has negotiated exclusive rights to publish a work (say, for Canada) only to find a rival publisher selling the same work in competition to him without having negotiated any such rights.

It was a principal conclusion of Chapter 2 that exclusive property rights seldom exist and, indeed, in most cases would be impossible and undesirable to enforce due to the interdependency of competing claims. With regard to the case at hand, broadcasters wish to claim market exclusivity of program rights and would like to prohibit cable television's importation into their market of those programs for which they have procured "exclusive" rights. On the other hand, cable claims the right to trap off air and to rediffuse broadcasting signals, irrespective of the program content of those signals, and this claim is enforced by the current **Copyright Act** as judicially interpreted. However, given our position on the general non-existence of exclusive claims, we are unable to reach a determination on the issue at hand as a matter of principle. We consider that this issue must be resolved by delving deeper into the particular circumstances of the case.

Two additional points should be made in this regard, however. First, by CRTC regulation, cable systems must delete distant signals (and substitute in their stead local signals) during times of simultaneous program duplication. This regulation has the effect of re-establishing program exclusivity in those instances where identical program material is diffused simultaneously. (At one time, the CRTC considered enforcing these deletion and substitution provisions for seven days prior to and subsequent to local broadcasts but did not proceed in the

face of representations from the cable industry in opposition to this proposal).<sup>34</sup>

Second, it can be argued that freedom of contracting might cause these problems to sort themselves out. In negotiating rights to a local market, it can be argued, program rights' holders are aware that distant signals imported by cable will reduce the value of "exclusive" rights as perceived by the local broadcaster and, hence, they will accept reduced payment. Likewise, it can be argued, rights' holders are aware that television stations are rediffused by cable systems beyond the geographic coverage pattern of their broadcast contours and, in this realization, will be able to negotiate higher payments than would otherwise be the case. The net effect, it can be argued, is zero (unless viewers spend more time watching television as a result of the greater variety attributable to cable).

This latter argument seems reasonable on the surface. Nonetheless, three points should be made to it in opposition: the international broadcasting question; transactions costs and imperfect knowledge; and technological change.

With regard to the international aspects, it is quite conceivable, even assuming costless transactions and perfect knowledge, that Canadian stations and copyright holders could lose out to foreign stations and copyright holders. To the extent that Canadian stations lose their exclusive program rights as a result of importation of American signals by cable, revenues to Canadian broadcasters will decline and, in all likelihood, will not be compensated for by revenues attributable to increased exposure in American markets.<sup>34</sup> To the extent that copyright payments from Canadian broadcasters to Canadian program producers are related to the revenues received by these broadcasters, cable could cause a decline in the Canadian program production industry.<sup>35</sup>

With respect to ease of contracting and perfect knowledge, it is sufficient to point out that it may be difficult and costly to prevent slippages from the system, thereby resulting in reduced revenues.

Of most significance, and related to the preceding points, is the issue of technological change. To date, cable companies have been restricted technologically in their importation of distant signals by the technical capability of well-placed antennae arrays (head-ends) or such arrays supplemented by microwave links and distant head-ends. The regulatory authority has also served to circumscribe the permissible uses of the latter.

Through the linking of cable with communications satellite technology, however, hitherto local stations can be distributed nationally by cable systems for essentially zero marginal cost once the signal is carried by satellite. In the foreseeable future, direct broadcasting satellites (DBS) may provide national coverage of "stations" without the required intermediation of cable systems.

The use of satellites in conjunction with cable systems or otherwise increases problems regarding program exclusivity for local broadcasters and in the longer term may throw into question the very existence of local broadcasting as we know it. Any program rights' holder could very well find it more lucrative to sell exclusive, national rights in program material to "stations" carried nationally by cable systems rather than to local stations and networks comprised of interconnected local stations; such sale of rights would preclude the sale of the programming to local stations (or networks acting on their behalf). American "stations" or networks receivable in Canada through cable networking or directly through DBS could likewise foreclose purchase of rights by Canadian "superstations".<sup>36</sup> Copyright holders intent on maximizing revenues can be expected to sell exclusive rights to entities with the greatest coverage, at least when exclusivity is involved.

The regulatory authority has an important responsibility in these matters, of course. The CRTC possesses full authority regarding what signals will be carried on Canadian satellites and/or rediffused by Canadian cable television systems. If it were to permit the widespread distribution of Canadian or American "superstations" nationally (either through cable-satellite networks or directly through DBS) which duplicated substantially the program schedules of local

broadcasters, it would probably be foreordaining the demise of the latter, at least in non-metropolitan markets. These "superstations" would be in a position to compete for exclusive national program rights against the national networks, and would be in a position to foreclose the broadcast of attractive programming by independent stations and by affiliated stations during non-network time periods. We can also envisage an increase through competitive bidding in the prices charged by American producers with the advent of entities with national Canadian coverage.

Some problems of technological change and copyright policy are taken up again in Chapter 10, **Conclusion**.

#### SUMMARY

This chapter began by discussing a number of key economic questions pertaining to cable copyright liability - monopoly, incidence, equity among viewers, cable's financial impact on broadcasters and copyright holders, incentives from cable copyright liability. The chapter discussed two basic ways in which cable companies could be required to make copyright payment - bargaining and compulsory licensing. It was noted that bargaining, while possibly maximizing copyright payments, was disadvantageous as compared to compulsory licensing as regards possible disruptions in subscriber services, pursuit of Canadian communications policy, transactions costs and enforcement.

The chapter then addressed economic issues flowing from three proposals to invoke cable copyright liability: those of Keyes-Brunet, the Economic Council of Canada, and the Clyne Committee. The principal advantage of Keyes-Brunet is that it retains in Canada all cable copyright payments, but this retention is at the expense of discrimination in law as to nationality and the probable international difficulties resulting therefrom.

There are other disadvantages associated with Keyes-Brunet. Since payments would accrue to broadcasters, both public and private, a significant portion of the funds would not be used to stimulate Canadian program productions. Also, the proposal

entails creation of a proprietary right in broadcast signals, contrary to broadcasting policy which states clearly that "radio frequencies are public property."

The recommendations of the Economic Council possess several advantages. Copyright payments would be largely retained in Canada without any discrimination as to nationality in law. Secondly, the funds are directed to non-commercial broadcasting where financial need is greatest and where programming performance is best. Thirdly, property is created in the licence to exhibit programs, not in diffusion, and this is in accord with the principle that "radio frequencies are public property." Fourthly, market forces would be adjusted more in accordance with the goals of Canadian communications policy than would be the case if the Keyes-Brunet proposals were adopted. One disadvantage of the Economic Council position is shared by the Keyes-Brunet proposal: no special provision is made to encourage independent producers.

Finally, we noted that the Clyne Committee recommended protection in law for the market exclusivity of program rights. We are unable to make a determination on the issue as a matter of principle, and reserve judgement on this until discussing technological change in Chapter 10, **Conclusion**.

## NOTES

1. A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law*, pp. 142-3.
2. See, for example, Steven Globerman and Mitchell Rothman, "An Economic Analysis of a Performers' Right", paper prepared for the Research and International Affairs Branch, Department of Consumer and Corporate Affairs, Ottawa, mimeo, 1979. The authors state: "A copyright is a publicly-granted monopoly; unless some important public purpose is to be served, the public should not create monopolies." (p. 7). Similarly, S.J. Liebowitz asserts: "Giving a monopoly to a copyright holder is an attempt to allow him to extract as much of the value of the good as possible from the public. Once the good has been produced, a monopolistic copyright holder will cause losses to society by refusing to reproduce the items in the most efficient quantities". S.J. Liebowitz, *Copyright Obligations for Cable Television: Pros and Cons*, (Ottawa: Minister of Supply and Services for the Department of Consumer and Corporate Affairs, 1980), p. 3.
3. Gordon D. Kaufman, *Relativism, Knowledge and Faith* (Chicago: University of Chicago Press, 1960); also Stanislav Andreski, *Social Science as Sorcery* (London: Andre Deutsch, 1972); Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed., (Chicago: University of Chicago Press,

1969); Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (Chicago: University of Chicago Press, 1962).

4. See, for example, Kenneth Boulding, *Economic Analysis*, Vol. 1 *Microeconomics*, 4th ed., (New York: Harper and Row, 1966), pp. 470-485; and Harold Hotelling, "Stability in Competition," *Economic Journal*, Vol. XXXIX (1929), pp. 41-57.

5. George Stocking and Willard Mueller, "The Cellophane Case and the New Competition," *American Economic Review* Vol. XLV (1955), pp. 29-63.

6. Joe S. Bain, "Relation of Profit Rate to Industry Concentration", *Quarterly Journal of Economics* (August, 1951), H. Michael Mann, "Seller Concentration, Barriers to Entry, and Rates of Return in Thirty Industries 1950-1960," *Review of Economics and Statistics* (August 1966).

7. Joe S. Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries* (Cambridge: Harvard, 1965); and William G. Shepherd, *The Treatment of Market Power: Antitrust, Regulation and Public Enterprise* (New York: Columbia University Press, 1975), pp. 92-113.

8. Tony Schwartz, *The Responsive Chord* (Garden City: Anchor Press/Doubleday, 1974), p. 52.

9. There are certain significant fixed costs associated with television viewing, such as purchase or lease of the equipment and perhaps monthly cable charges, but the variable costs associated with viewing are low consumption of electricity and depreciation of the set itself.

10. Indeed this "wasteful duplication" of program types as competition increases has often been held by economists to be a detriment of the competitive system in broadcasting. See *inter alia* Peter Steiner, "Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting", *Quarterly Journal of Economics* (1952); Peter Wiles, "Pilkington and the Theory of Value," *Economic Journal* (1953); Harvey Levin, "Program Duplication, Diversity and Effective Viewer Choices: Some Empirical Findings," *American Economic Review* (1971); and Edward Greenberg and Harold Barnett, "TV Program Diversity - New Evidence and Old Theories", *American Economic Review* (1971).

11. The more narrowly one defines an industry or product, the more highly concentrated will that industry appear to be. The producers of the "Tonight Show", have a monopoly on the "Tonight Show" but not on talk shows generally and certainly not on television programming. This is not to deny that certain productions, due to their uniqueness, such as the Grey Cup game or a heavyweight title fight, may be associated with a good deal of monopoly power. See more generally Maxwell R. Conklin and Harold T. Goldstein, "Census Principles of Industry and Product Classification, Manufacturing Industries," **Business Concentration and Price Policy**, A Report of the National Bureau of Economic Research (Princeton: Princeton University Press, 1955), pp. 15-55.
12. The weakness of independent television production in Canada was discussed, above, in Chapter 3.
13. This is not to deny the origins of copyright several hundred years ago in the bestowal of monopolistic privilege. See R.J. Robert, "Canadian Copyright: Natural Property or Mere Monopoly," **Canadian Patent Review**, Vol. 40 (2d), pp. 33-54.
14. Leonard Good, **An Economic Model of the Canadian Cable Television Industry and the Effects of CRTC Regulation**, Ph.D. thesis, University of Western Ontario, 1974, pp. 60-74; International Institute of Quantitative Economics (Concordia University), **Economic Study of the Financial and Market Characteristics of the 16 Largest CATV Companies in Canada**, report prepared for Department of Communications, 1974, pp. 35-42; Robert E. Babe, **Cable Television and Telecommunications in Canada: An Economic Analysis**, pp. 17-47; and Stuart McFadyen, Colin Hoskins and David Gillen, **Canadian Broadcasting: Market Structure and Economic Performance**, pp. 223-246.
15. See footnote 14, above.
16. McFadyen, Hoskins and Gillen, **Canadian Broadcasting**, p. 231. See, however, Leonard Good, **An Econometric Model of the Canadian Cable Television Industry and the Effects of CRTC Regulation**, p. 100, where a slightly inelastic demand is estimated. Profit maximizing monopolists will not charge prices in the inelastic region of their demand curve.
17. McFadyen, Hoskins and Gillen, **Canadian Broadcasting**, p. 231.
18. See Richard Musgrave, **The Theory of Public Finance: A Study in Political Economy** (New York: McGraw Hill 1959),

pp. 289-309. Alternatively, a unit tax per subscriber ("excise tax") could be imposed but this is held to be less efficient. See *Ibid.*, pp. 287-289, 309.

19. To the extent that any decrease in subscribers is viewed as undesirable, cable companies could maintain current rates for basic services and recover (a portion of) the tax on charges for supplementary services such as pay television, videotext services, or alarm and meter readings.
20. "We thus find ourselves in somewhat puzzling circumstances. The over-the-air television market does not charge only consumers of programs. Other segments of the community help pay program suppliers. Under the various copyright proposals discussed previously, the users of CATV are charged for their viewing of a show. Thus, over-the-air viewers are treated in a manner dissimilar to CATV viewers ... All viewers [of non-commercial television funded by voluntarily contributions] have the choice of being free riders and there is no reason why CATV viewers should not be allowed to free ride also." S.J. Liebowitz, *Copyright Obligations for Cable Television Pros and Cons* pp. 21,18.
21. See Carl Beigie, "An Economic Framework for Policy Action in Canadian Telecommunications" in H.E. English, ed., *Telecommunications for Canada: An Interface of Business and Government* (Toronto: Methuen, 1973), pp. 101 ff.
22. CRTC, "Public Announcement: The Improvement and Development of Canadian Broadcasting and the Extension of U.S. Television Coverage in Canada by CATV", December 3, 1969.
23. Robert E. Babe, *Cable Television and Telecommunications in Canada: An Economic Analysis*, and S.J. Liebowitz, *Copyright Obligations for Cable Television: Pros and Cons*.
24. Stanley Besen, Willard Manning and Bridge Mitchell, "Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem," *Journal of Law and Economics* 21(April, 1978), p. 86.
25. Technically, this is equivalent to perfect price discrimination whereby each purchase by each customer is segregated, charging as much as the traffic will bear on each purchase, thereby maximizing revenues. See Alfred A. Kahn, *The Economics of Regulation; Principles and Institutions*, Vol. 1, *Principles* (New York: Wiley 1970), pp. 131-133.

26. Compulsory carriage of Canadian programs and stations, as could be required by regulations, destroys the ethic of the market-based price determination since the Canadian stations could exact high payments due to the compulsory nature of carriage, irrespective of viewer popularity.
27. Again, if payments are based on the number and types of signals carried, the bulk of the payments could well go to U.S. stations unless discriminatory features are built into the legislation.
28. Examples include transactions with subsidiaries and affiliates, high executive salaries; rate base padding; so forth.
29. Economic Council of Canada, **Report on Intellectual and Industrial Property**, p. 176.
30. Cable companies in the absence of a CRTC order requiring the carriage of such signals, could be expected to weigh the trade-off between copyright payments incurred through carriage of such signals versus decreased subscription revenues stemming from deletion of the public broadcasting signals.
31. In one set of regression equations it is estimated that the local audience is valued at 2 1/2 times the distant (C-contour) audience. Nevertheless, in other regressions, the author finds "that distant viewers are worth more than local viewers ... This is surely a suspicious result." Liebowitz, **Copyright Obligations for Cable Television** p. 43.
32. This is not to rule out the possibility that in large metropolitan markets cable companies could not profitably segment the markets with neighbourhood advertising substitutions.
33. Alternatively, distant stations could themselves solicit local advertising and contract with cable companies for substitution. This line of argument is not pursued, however, since it is unrelated to the issue of cable copyright liability.
34. If cable companies were required simply to delete the distant signal when it carried programming transmitted nonsimultaneously but within seven days of broadcast by a local station, no copyright liability by the cable company would arise, although the blanking out of channels would cause irritation to cable subscribers. If, on the other

hand, cable companies substituted the distant broadcast of the program by running a videotape (commercials intact) of the local broadcast, the cable company would indeed be liable for copyright payment under present law and would have to negotiate with the rights holder to undertake this activity.

35. The Liebowitz study, cited earlier, largely ignored the possible differential impact of cable on American and Canadian broadcasters and restricted its concern to the net impact of cable on Canadian and American stations as a group. The Babe study did consider the impact of cable on Canadian stations alone and concluded that no deleterious financial impact could be discerned to the time of analysis (1972 data). Nonetheless, this author warned that it was likely that in the future cable television would decrease broadcast revenues for a number of reasons. See Babe, **Cable Television and Telecommunications in Canada**, pp. 208-212.
36. See table 4, Chapter 3 and the related discussion regarding the relation between program expenditures and revenues as regards public and private broadcasters.

## CHAPTER 5

# Cable Copyright, Cultural Policy and Broadcasting Policy

*by Conrad Winn*

### INTRODUCTION

Questions of copyright usually have implications for culture. Copyright questions which involve cablevision most certainly have implications for broadcasting. In principle, deciding whether Canadian cable companies should pay for the right to rediffuse broadcasts should involve a consideration of Canadian cultural and broadcasting policies. Ideally, the decision to enact a rediffusion right and the decision to select one particular form of right over another should reflect the general principles guiding cultural policy in general and broadcasting policy in specific.

However, to place cable copyright in the context of Canadian cultural and broadcasting policy is not a straightforward task. The federal government's financial involvement in culture and communications is substantial. But, for reasons intrinsic to the subject, it has not always been possible for the federal government to be very clear or forthcoming about its policy goals. The federal government spends about one billion dollars annually on culture and communications when this sector is defined narrowly to include mainly the so-called cultural agencies. Among the cultural agencies, the Canadian Broadcasting Corporation is the principal recipient of financial assistance (see table 5). If culture is defined more broadly to

include religion and family life, the financial involvement of the federal government becomes even larger as a result of various tax expenditures in support of organized religion, marriage, procreation, and other aspects of family life.

**TABLE 5**  
**Selected Cultural Expenditures**  
**of the Government of Canada**  
**Main Estimates, 1980-82**

(in millions of dollars)	1980-81	1981-82
Arts and Culture branch*	20.4	29.7
Canada Council	44.6	49.9
Canadian Broadcasting Corporation	577.4	649.4
Canadian Film Development Corporation	4.1	4.2
Department of Communications**	107.6	107.6
National Arts Centre Corporation	10.9	11.9
National Film Board	40.3	46.4
National Library	17.1	21.4
National Museums	52.4	56.1
Public Archives	23.9	29.0
Social Sciences and Humanities Research Council	41.7	45.6

\* Transplanted from Department of Secretary of State to Department of Communications in 1980.

\*\* Excludes Arts and Culture branch. See previous note.

Inspite of its substantial financial role in many facets of culture, the federal government has hesitated to identify fully its objectives and to pronounce an unambiguous policy on the subject. No minister has been assigned culture as a prime responsibility. No department has been given culture as its principal mandate. Bureaucratic authority has been vested in a small, 24-person Arts and Culture branch. Transplanted to the Department of Communications in 1980, the Arts and Culture branch was previously located in the Department of Secretary of State,

which has been a kind of residual category among federal government departments.<sup>1</sup>

Despite the absence of an official cultural policy, it is possible to identify one core theme in the cultural programmes of the federal government and in cabinet pronouncements. It is the encouragement of cultural expression by Canadian nationals and the encouragement of cultural activity bearing Canadian input. The goal of more Canadian content is reflected more strongly in broadcasting than in other sectors of culture. However, the goal of more Canadian content has become more salient in all aspects of cultural expression in recent years as the federal government has sought to stem the growth of centrifugal forces in Confederation.

The Keyes-Brunet proposal to provide copyright protection for broadcasts which are Canadian in origin is consistent with and supportive of the federal government's general policy goal of greater Canadian content in culture and broadcasting. The present chapter concludes that the achievement of certain Canadian cultural and broadcasting objectives would be assisted by the enactment of a rediffusion right restricted to Canadian broadcasts or by some analogue of copyright intended to provide financial encouragement for the production of Canadian programming.

Cultural policy and broadcasting policy cannot be the only criteria by which to judge whether or not a rediffusion right should be enacted and whether or not copyright protection should be restricted to Canadian broadcasts. A decision to limit protection to indigenous broadcasts could have implications for Canada-United States relations. Since Canadian copyright material in Canadian broadcasts rediffused by certain U.S. cable systems may qualify for royalties under the new U.S. **Copyright Act**, both the American broadcasting/entertainment industry and the United States government might become perturbed if Canadian copyright law did not provide reciprocal protection.<sup>2</sup> Anticipated American reactions to Canadian copyright policies and possible Canadian strategies are discussed below in Chapter 6 on **Copyright, Federal-Provincial Relations, and International Relations**. The extent to which Canadian copyright interests are

actually protected by U.S. legislation is examined in Chapter 7, **Administrative and Regulatory Issues**.

To return to the matter of Canadian cultural policy, it is not primarily federal government lassitude that accounts for the slow articulation of cultural objectives. The development of cultural policy has been impeded by the fact that the idea of culture is somewhat of a conundrum. For example, is culture merely the activity of professional artists, or does culture encompass all activity impacting on values, beliefs, and identity? The development of cultural policy has also been impeded by various political or religious concerns about the desirability or propriety of public support for culture. For example, is the principle of freedom of cultural expression entirely compatible with governmental encouragement of Canadian cultural expression?

The remainder of this chapter deals with the following topics, in sequence: (a) some concepts of culture, (b) impediments to the formulation of Canadian cultural policy, (c) elements of Canadian cultural policy, (d) elements of Canadian broadcasting policy, and (e) a conclusion.

### SOME CONCEPTS OF CULTURE

One impediment to the enunciation of a cultural policy may well be the very divergent meanings attached to the term culture.<sup>3</sup> Most Canadians are probably familiar with the idea of culture as it is used to refer to the refinements of upper class living. According to this Euro-centric aristocratic tradition, culture consists only of the particular social customs, religious rituals, musical traditions, and artistic inclinations which the upper classes of Europe have succeeded in passing on from one generation to the next. In the field of music, culture would include the work of Mozart, Beethoven and other "classical" composers but it would not include jazz, rock, country and western, far Eastern, African, Jewish, or various kinds of folk music.

As a result of the democratization of Western societies in the twentieth century, the growing interdependence of the nations of the world, and as a result of the burgeoning of social science

scholarship in the universities, the idea of culture was broadened to include the beliefs and practices of all strata and indeed of all peoples. The growth of the idea that non-upper class people, non-Christians, and non-whites do have their own cultures paralleled the growth of the idea that all strata and all peoples should have the franchise and other political rights.

The growing pluralism and acceptance of other cultures may have increased the problems of the federal government in articulating a precise cultural policy for Canada. Much of the credit for recognizing that culture was not a uniquely European phenomenon must go to anthropology, which was the first scholarly discipline to venture forth to explore the cultures of non-European societies including many "primitive" tribal societies in Africa and Asia. For anthropologists, culture became an all-inclusive concept. Virtually all behaviour could be examined from the perspective of the values and beliefs of a culture. In the hands of anthropologists, culture became a language of analysis or a scientific approach for examining all social phenomena.

This all-inclusive notion of culture is reflected in the deliberations of UNESCO. At a major round-table on cultural policy, the organization went on record as refusing to define culture or cultural policy. Instead,

It was considered preferable: (a) that "cultural policy should be taken to mean the sum total of the conscious and deliberate usages, action or lack of action in a society, aimed at meeting certain cultural needs through the optimum utilization of all the physical and human resources available to that society at a given time; (b) that certain criteria for cultural development should be defined, and that culture should be linked to the fulfillment of personality and to economic and social development."<sup>4</sup>

In practice, the round-table went on to link cultural development to education: "literacy programmes and cultural development form an indivisible whole."

There is certainly some scientific validity to the anthropological notion that most or perhaps all social phenomena have cultural implications. With respect to government operations, for example, one could argue that the size of a defence budget reflects in part the cultural values placed on military activity by a given society. In a similar vein, one could argue that the income tax status accorded by governments to dependent children reflects the cultural values placed on child-rearing in a given society.

The difficulty posed by an all-inclusive notion of culture is not scientific but practical. If virtually all governmental activity is construed as cultural, it becomes difficult for a government to adopt a specifically cultural policy. If everything can be considered to be cultural, perhaps nothing is uniquely so.

A **semi-inclusive** notion of culture would include only those governmental activities which have a direct bearing on the expression or inculcation of values and beliefs. Such a semi-inclusive notion of culture would encompass education, religion, and mass communication along with the more traditional cultural sectors of publishing, music, the performing arts, and the visual arts. The **least inclusive** or narrowest notion of culture, European and aristocratic in its origin, would consist of highbrow publishing, music, theatre and visual arts.

From the perspective of usefulness to government, the least inclusive idea of culture has some merit. Its concern with elite culture is both its weakness and its strength. It is certainly true that governmental contributions to theatre, museums, and the visual arts subsidize primarily the well educated upper-middle income strata. Yet, these people are disproportionately important to the development of indigenous culture, to national and regional voluntary organizations, and to national identity.

From the perspective of usefulness to government, the semi-inclusive idea of culture probably has the greatest merit. It is sufficiently narrow to be workable. Yet, it is sufficiently broad to enable governments to consider the impact on values and beliefs of a reasonably wide range of government programs. The semi-inclusive idea of culture appears to be the one adopted by the current Federal Cultural Policy Review Committee chaired by Louis Applebaum:

...the Review Committee feels it should place some limits on the fields it will cover...Science and scientific research, insofar as they have an impact on culture, are best and most logically examined in other contexts. Sports and recreation, while clearly of a cultural nature according to some definitions, will not by and large be included in our work. Similarly, the field of formal education, except as it relates to specialized professional training of artists, is not strictly within the scope of this review. Education is, in any case, a matter of provincial competence.<sup>5</sup>

#### **SOME IMPEDIMENTS TO THE FORMULATION OF CANADIAN CULTURAL POLICY**

The divergent meanings attached to the concept of culture are bound to frustrate the articulation of cultural policy in many countries. But, for Canada there exist some powerful additional impediments to the formulation of policy. The following impediments will be discussed briefly: (a) the weakness of national symbolism, (b) the bicultural nature of the Canadian people and the federal organization of government, (c) the pragmatic tradition in English Canada, (d) a Puritan strain among Canadian Protestants, and (e) perceived totalitarian implications of cultural leadership by government.

There is a kind of circular or tautological relationship between the strength of national cultural symbols and the strength of national cultural policies. Proud nations have

governments which are prepared to spend the necessary resources to celebrate national accomplishments by means of monuments, museums, and other symbolic ventures. But, nations which are not self-consciously proud of their heritages have governments which feel embarrassed at the thought of celebrating what they have come to view as meagre accomplishments.

According to a conventional wisdom, Canadian culture is weak and undifferentiated by international comparison. A study of Canadian cultural policy commissioned by UNESCO expressed precisely this view:

The country has few of those national symbols, historic monuments, folk costumes, battlescars, exotic foods, celebrated personalities or distinctive artifacts which punctuate other nations and provide them with a sense of international identity.<sup>6</sup>

The conventional wisdom about the bland or unvital character of Canadian culture is shared by many Canadians and is therefore an important part of Canadian culture. But, as a description of cultural reality, the conventional wisdom is not entirely valid. The perception of Canadian culture as comparatively bland and indistinct depends partly on an exaggerated and sometimes fictitious portrait of foreign cultures which are not as unique and vibrant as they are portrayed. The perception of Canadian culture as relatively bland and indistinct also rests on an ignorance of the many geographic wonders, battlescars, folk costumes, and exotic foods which are plentiful outside the country's main urban centers. Finally, the perception of Canadian culture as less than vital arises from inevitable comparisons with the extraordinarily productive and prosperous cultural industries found in the United States.

The inevitable comparison between the levels of cultural activity in Canada and the United States is especially misleading because of the great size and prosperity of the American cultural marketplace. The size and wealth of the American economy goes a considerable distance to explaining the pre-eminence of the

American entertainment industry in world markets. It would be mistaken to judge Canadian cultural vitality by the standards of American performance. In broadcasting, for example, it is desirable to increase Canadian programming content. However, around the globe only three major countries - the U.S., U.S.S.R., and Japan - are self-sufficient in programming.<sup>7</sup> Hence, failures to increase Canadian content programming should not be taken as conclusive evidence against Canadian culture, but perhaps more as evidence against government policy under difficult economic circumstances.

Of course, the perception of Canadian culture as weak is not entirely unfounded. The museums, the publishing industry, and some other sectors have a history of underdevelopment owing to insufficient support from government and from private benefactors. For example, in 1932 a report of the Museums Association of Great Britain noted that the Canadian government did support the Public Archives, the National Parks Board and other bodies but that "less is spent on the whole group of 125 institutions than is spent upon one of the great museums of Great Britain, Germany or the United States."<sup>8</sup> However, the argument being made here is not primarily that the conventional wisdom of cultural weakness is completely unfounded but rather that the perception of cultural underdevelopment helps retard the development of policy.

The slow development of cultural policy is also related to some important political features of the Canadian experience, principally **biculturalism** and **federalism**. Few countries in the world have managed to survive for lengthy periods while consisting of more than one major language group or people. Canada is one of them. Still fewer have been able to articulate cultural policies which can transcend the internal boundaries separating "sub-national nations." Canadians of French and British ancestry share some common historical memories but they also have some different historical memories - about the Conquest and about intermittent conflicts over educational matters and foreign policy from Confederation to the present day.

Federalism poses a specific additional problem because education and culture are frequently seen as closely connected.

The **BNA Act** treats education as an essentially provincial matter while making no specific reference to culture. Copyright is placed under federal jurisdiction. Recent Quebec governments have claimed culture as a provincial jurisdiction partly on the grounds that education, a collateral field, is under provincial jurisdiction and partly on the grounds that only the Quebec government can be entrusted with the protection of French-language culture.<sup>9</sup> The different federal and provincial perspectives are explored more fully in the next chapter.

Another impediment to the development of cultural policy may be the pragmatism of English-Canada, inherited from Anglo-Saxon tradition. Pragmatism entails the incremental development of programs rather than the early proclamation of broad principles. The contrasting Anglo-Saxon and European traditions are reflected in the stances adopted by the Quebec and federal governments. The cultural policy of the Quebec government is more fulsomely documented and its guiding axioms more clearly stated. Yet, the cultural programs of the federal government are generally older, more developed, and more substantial than those of Quebec.<sup>10</sup>

A still further impediment to cultural policy has been a Puritanical ethos among English-speaking Protestants. The original Puritans associated the visual and performing arts with sinfulness, and some of this ethos persisted long after the end of the Puritan regime. Ostry has suggested that "this Puritan antagonism was imported into Canada and may still be one of the lingering obstacles to government support for the arts."<sup>11</sup>

Finally, the development of cultural policy has been impeded by the fear that government involvement in culture carried totalitarian implications. There exists in Canada a tradition of principled concern that government not interfere with or impact on the basic values of society. There has been a particular sensitivity about government involvement in culture because so many of Canada's serious domestic crises have been about education - notably, the Jesuit Estates controversy, the Manitoba Schools conflict, Ontario's "Regulation 17," and Quebec's recent rules affecting language of instruction.<sup>12</sup>

### ELEMENTS OF CANADIAN CULTURAL POLICY

The federal government last completed a formal assessment of cultural policy in the years 1949-51 under the auspices of the Royal Commission on National Development in the Arts, Letters, and Sciences (the Massey-Levesque Commission). Major social, economic, political, and cultural changes have taken place since then. A list of these changes would have to include the arrival of new technologies such as cable television, satellite broadcasting and videodiscs, economic difficulties facing publishing and other traditional cultural sectors, provincial government involvement in culture and broadcasting, the Quebec referendum, active competition from the Quebec government for cultural leadership in the French language, the fiscal rise of the Western provinces, and the increased numbers of Canadians of non-British and non-French origin.

The Federal Cultural Policy Review Committee (the Applebaum-Hébert Committee) was created in order to fill the need for a current assessment of cultural needs. Its work is intended to assist the federal government in the preparation of a White Paper on Cultural Policy for release in 1982.

Before the White Paper becomes available, however, it is still possible to identify some basic principles governing federal cultural programs by considering the original Massey-Levesque report, the opening statement of the Applebaum-Hébert Committee, various non-governmental sources such as the A.U.C.C.'s Symons Commission and by examining the actual performance of federal programmes.<sup>13</sup> In practice, some of the same themes keep re-occurring.

The first principle of federal government cultural policy appears to be to encourage activities which enhance the cultural awareness and national identity of Canadians. The principle of encouraging indigenous activity is common to the cultural policies of most national governments. But, it receives a special urgency in Canada because of the salience of cultural products imported from a single foreign country and because of the growing evidence of conflicting national and regional loyalties within Canada. The Applebaum-Hébert Committee

described the principle as "the improvement of the capacity of Canadians to see and to know themselves."<sup>14</sup> The principle of encouraging Canadian cultural expression is manifested in such diverse ways as the broadcasting content regulations of the Canadian Radio-television and Telecommunications Commission and the residency requirements of the Canada Council and Social Sciences and Humanities Research Council.

The second principle which appears to characterize Canadian cultural programs is an emphasis on mass rather than elite culture. The Applebaum-Hébert Committee described the principle as the "improvement of public access to cultural activities and creations."<sup>15</sup> The principle of emphasizing mass culture is reflected in the government's early eagerness to become involved in broadcasting but not in other domains. The principle of emphasizing mass culture is also reflected in the much greater sums available to the CBC than to highbrow or elite institutions such as the National Museums. But, even the ostensibly elite-oriented Museums were inspired by the principle of "democratization and decentralization," to use the language of one time Secretary of State Gérard Pelletier.<sup>16</sup>

A third principle is to augment the economic resources available to Canadian cultural producers so that they can compete more effectively with American cultural producers. It has been assumed that the success of American cultural products in the Canadian marketplace is related to the superior technology and greater economies of scale available from the U.S. domestic market. In the words of the Applebaum-Hébert Committee, the principle entails "the strengthening of cultural institutions and industries so that they are able to contribute to Canada's cultural life."<sup>17</sup> In practice, the principle is reflected in diverse government initiatives such as tax expenditures in support of Canadian films, the termination of special status for the Canadian edition of *Time*, and an end to the favourable tax treatment of Canadian advertising on U.S. border stations.

The fourth and last major principle is the principle of cultural liberty; in the words of the Applebaum-Hébert Committee, "the enhancement of opportunities for creative expression and cultural choice."<sup>18</sup> The principle of cultural liberty is

intended to provide consumers with freedom of choice and to provide artist/creators with independence from the whims of benefactors. In practice, most governmental grants for cultural purposes are peer-adjudicated, are virtually immune from cabinet influence, and are largely immune from bureaucratic influence. In order to provide cultural producers with alternatives to government assistance, Canadian tax laws treat favourably private benevolence for cultural purposes. Furthermore, the increasing role of provincial governments gives artist/creators one more alternative to financial aid from federal government agencies and therefore one additional source of immunity from administrative whim.

#### **ELEMENTS OF CANADIAN BROADCASTING POLICY**

The basic principles governing Canadian broadcasting policy parallel closely the principles of Canadian cultural policy. The main difference is that broadcasting policy rests on a more elaborate foundation consisting of legislation by Parliament, regulation and case law under the jurisdiction of the CRTC, and authoritative guiding statements by the Minister of Communications, the chairman of the CRTC and other spokesmen.

The first principle of encouraging Canadian cultural expression is clearly stated in the **Broadcasting Act**:

...the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.

Furthermore,

the national broadcasting service should...contribute to the development of national unity and provide for a continuing expression of Canadian identity.

The principle of encouraging indigenous cultural expression is also reflected in the regulatory behaviour of the Commission and in the continuing statements of government spokesmen. The

federal government requires broadcasting undertakings to be owned by Canadians. The CRTC supervises this requirement and obliges both public and private broadcasters to meet certain quotas of Canadian content programming, particularly during prime time. The current chairman of the CRTC has reiterated the importance of augmenting Canadian content and has stated that broadcasters will be required to fulfill their programming obligations or risk losing their licences.<sup>20</sup> The Minister of Communications continues to point to the importance of Canadian content programming.<sup>21</sup>

The second principle of cultural policy, an emphasis on mass culture and broadcasting, is naturally reflected in commercial television broadcasting as it has evolved to date. The flavour of being oriented to the needs of the mass of Canadians is carried over into some aspects of broadcasting policy. Thus, the CRTC postponed pay-T.V. deliberations until after the Commission was able to assess the broadcasting needs of Canadians located in remote areas and having few programming options. The basic needs of all Canadians must be met before the auxiliary needs of urban dwellers are considered.<sup>22</sup>

The third principle of cultural policy, strengthening the economic position of Canadian producers, is reflected in various aspects of broadcasting policy. The federal government put an end to the favourable tax treatment accorded to Canadian advertising on U.S. border stations in order to stem the revenue losses facing Canadian broadcasters in adjoining locations. In a similar vein, the CRTC introduced the practice of simultaneous program substitution.<sup>23</sup> In its licensing deliberations, the Commission has been careful to consider questions of economic viability with respect to the creation of new broadcast outlets or with respect to changes in ownership. The Commission has been cognizant of the favourable impact on the domestic record industry of its content policy for radio. In recent months, the Commission chairman suggested a number of innovative ways by which indigenous program production might be encouraged.<sup>24</sup>

The fourth principle of cultural policy, cultural liberty, is also reflected in broadcasting policy. The **Broadcasting Act** declares that "the right to freedom of expression and the

right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned." The **Copyright Act** is one such statute. Furthermore, the **Broadcasting Act** asserts that programming "should provide a reasonable, balanced opportunity for the expression of differing views on matters of public concern..."<sup>25</sup> The CRTC has taken an active interest in fairness complaints registered against broadcasters and has been favourable to the presence of competitive broadcasting in larger markets. The Commission's requirement that cable companies commit resources to a local, community channel is designed to increase the diversity in program options.<sup>26</sup> The Commission has also been concerned about the potential harm done to creative expression by the concentration of program production within broadcasting institutions and has encouraged a reliance on independent production, a policy which the CBC is now pursuing.

Although the principles of broadcasting policy parallel those of cultural policy, broadcasting policy has been articulated in a more elaborate fashion than has cultural policy. For example, section 3 of the **Broadcasting Act** prescribes organizational features of broadcasting and identifies the responsibilities of licensees. For example, radio frequencies are public property and broadcasting undertakings comprise a single system consisting of public and private elements. The Act also provides for regulation and supervision by a single independent public authority.

#### CONCLUSION

The Keyes-Brunet proposal to enact a rediffusion right for Canadian broadcasts flows rather directly from three principles of cultural and broadcasting policy, and potentially from all four. Principle 2, which emphasizes mass culture and broadcasting in particular, provides a context for considering the rediffusion right. If broadcasting retains its traditional primacy of importance in cultural policy, then the introduction of a rediffusion right must receive the most serious consideration.

Principle 1, the enhancement of indigenous cultural expression, is implemented in the Keyes-Brunet proposal to extend protection to Canadian broadcasts only. If the Canadian broadcasting system were not subject to regulation, the protection of Canadian broadcasts might discourage the cable carriage of Canadian broadcasts because of the added cost to cable companies implied by the copyright protection of Canadian broadcasts. But, the selection of channels carried by cable is subject to regulation. Hence, the effect of increasing revenue for the production of Canadian broadcasts would, if properly administered, improve the quality and/or quantity of Canadian broadcasts. The administration and structure of copyright payment is the subject of another chapter.

The logic of principle 3 is essentially the same as the reasoning pursued in the above paragraph. Principle 3 calls for the economic strengthening of Canadian artists/creators/producers so that they can compete more effectively in Canadian and foreign markets. If properly structured and administered, a rediffusion right for Canadian broadcasts would achieve this objective.

Principle 4 calls for freedom of cultural expression and enjoyment. Copyright payment for Canadian broadcasts would contribute to cultural liberty if greater revenues were available to independent artists/creators/producers, thereby enhancing the CRTC's policy of encouraging independent program production. Alternative mechanisms for distributing rediffusion revenue are discussed below in Chapter 7.

In summary, the Keyes-Brunet proposal is consistent with the main principles of Canadian cultural and broadcasting policies. But, the Keyes-Brunet proposal is not the only copyright proposed and copyright is not the only policy instrument capable of contributing to the cultural and broadcasting objectives of the federal government. Non-copyright instruments are discussed below in Chapter 9, **Alternatives to Copyright**.

## NOTES

1. The semi-autonomous cultural agencies were simultaneously transferred from the Secretary of State to the Minister of Communications. For a discussion of some of the difficulties encountered by the Department of Secretary of State and its Arts and Culture branch in co-ordinating federal cultural policy, see Bernard Ostry, *The Cultural Connection: An Essay on Culture and Government Policy in Canada* (Toronto: McClelland and Stewart, 1978), *passim* and Conrad Winn, "Department of the Secretary of State - Potpourri or Cultural Mandate" in G. Bruce Doern, ed., *Spending Tax Dollars: Federal Expenditures, 1980-81* (Ottawa: Carleton School of Public Administration, 1980).
2. In a speech to cable executives, the CRTC Chairman "wonder[ed] aloud...at the reaction of American producers whose product you import into Canadian homes, and who see money flowing north from their copyright fund when they can't expect to receive reciprocal compensation. This doesn't mean we have to ape the American legislation. It may simply not be right in the Canadian context." Address by John Meisel to the Canadian Cable Television Association, Vancouver, 28 May, 1980.
3. See Hebert J. Gans, *Popular Culture and High Culture* (New York: Basic Books, 1975); Francis Jeanson, *L'Action culturelle dans la cité* (Paris: Editions du Seuil, 1973); Maurice Lebel, "La culture et l'humanisme de notre âge de

transition," *Revue de l'Université d'Ottawa* (oct.-déc. 1976); Louis Schneider and Charles Bonjean, eds., *The Idea of Culture in the Social Sciences* (Cambridge, 1973); J. Ben-David and Terry Nichols Clark, eds., *Culture and Its Creators: Essays in Honor of Edward Shils* (Chicago: University of Chicago Press, 1977); and John Meisel, "Political Culture and the Politics of Culture," *Canadian Journal of Political Science* (Dec., 1974).

4. UNESCO, *Cultural Policy: A Preliminary Study* (Paris: 1969), p. 8. Consider also the following all-inclusive description from Ostry, *Cultural Connection*, p. 1: Culture "is what we do and the reason why we do it, what we wish and why we imagine it, what we perceive and how we express it, how we live and in what manner we approach death. It is our environment and the patterns of our adaption to it...It is the element in which we live."
5. Federal Cultural Policy Review Committee, *Speaking of Our Culture: Discussion Guide* (Ottawa: 1980), p.5.
6. D. Paul Schafer, *Aspects of Canadian Cultural Policy* (Paris: UNESCO, 1976), p. 11.
7. Se Ithiel de Sola Pool, "Direct Broadcast Satellites and the Integrity of National Cultures" in Kaarle Nordenstreng and Herbert I. Schiller, eds., *National Sovereignty and International Communication: A Reader* (Norwood, N.J.: Ablex, 1979).
8. See Archie F. Key, *Beyond Four Walls* (Toronto: McClelland and Stewart, 1973), p. 166. The case is frequently made that foreign ownership in the Canadian economy has reduced the role of private benefaction and hence retarded the development of Canadian culture. On the enormous role of private assistance in American culture, see Charles C. Mark, *A Study of Cultural Policy in the United States* (Paris: UNESCO, 1969), pp. 39ff.
9. See *Le Ministre d'Etat au Développement culturel, La Politique québécoise du développement culturel*, 2 vols. (Québec: Editeur officiel, 1978; Department of Communications, *Toward a Quebec Communications Policy* (Quebec: Editeur officiel, 1971); *Le Québec-maître d'oeuvre de la politique des communications sur son territoire* (Quebec: Editeur officiel, 1973, reprinted 1980); and the opening address by Clément Richard, Quebec Minister

of Communications, to the Conference of Ministers of Communication, Vancouver, November 26-27, 1980.

10. For some comparative federal and provincial expenditure data, see Ostry, *Cultural Connection*, pp. 113-41.
11. *Ibid.*, p. 28. Mark makes the following observation about the impact of Puritanical Protestantism on culture in nineteenth century America: "As late as the 1870's the leaders of the Baptist, Methodist and Presbyterian religions were debating the appropriateness of family recreation, not to mention theatre, dancing, or popular entertainment. In 1872, the Methodist Episcopal Convention passed by majority vote a list of 'amusements', including every form of art, that were forbidden to all Methodists." *Cultural Policy*, p. 15.
12. In its editorial of 2nd June, 1951 on the subject of the Massey Commission, the *Winnipeg Free Press* expresses some of its concern about the totalitarian implications of government involvement. A review of the bicultural cleavage in Canada appears as chapter 4 in Conrad Winn and John McMenemy, *Political Parties in Canada*.
13. T.H.B. Symons, *To Know Ourselves: The Report of the Commission on Canadian Studies*, vols. I and II (Ottawa: Association of Universities and Colleges of Canada, 1975). On scientific culture in Canada, see the Report of the Senate Special Committee on Science Policy, *A Science Policy for Canada* (known as the Lamontagne Report) and also J.J. Brown, *Ideas in Exile* (Toronto: 1967).
14. *Speaking of Our Culture*, p. 4.
15. *op.cit.*, p. 4.
16. See Ostry, *Cultural Connection*, pp. xiii and 57. One could plausibly reject the idea that federal cultural practices have emphasized mass culture or reject the idea that the national broadcasting service (i.e. CBC) is exclusively mass-oriented. However, the federal government's continued emphasis on broadcasting from its early days is unambiguous. The primacy of broadcasting in cultural priorities is important to the concluding arguments made in this chapter.
17. *Speaking of Our Culture*, p. 4.
18. *Ibid.*
19. *Broadcasting Act 1967-68*, c. 25, s. 1, Part I, 3 (b) and (g) (iv).

20. See the interview with John Meisel in *Globe and Mail*, 30th Dec., 1980.
21. See the address by the Hon. Francis Fox, Minister of Communications, "Programming and Nationhood," to the Canadian Broadcasting League, Ottawa, 6th Oct., 1980.
22. See note 20, *supra*.
23. See CRTC, "A Review of Certain Cable Television Programming Issues" (Ottawa, March 26, 1979), p. 7.
24. See John Meisel, "Five Steps to Survival," address to the York University Conference on Mass Communications and Canadian Nationhood, Toronto, April 10, 1981.
25. *op.cit.*, 3 (c).
26. See "Cable Television Regulations" and CRTC, "Policies Respecting Broadcasting Receiving Undertakings (Cable Television)" (Ottawa December 16, 1975).

## CHAPTER 6

# Copyright, Federal-Provincial Relations, and International Relations

*by Conrad Winn*

### INTRODUCTION

This chapter examines federal-provincial relations and foreign relations from the perspective of cable copyright reform. In constitutional law, neither the introduction of a rediffusion right for broadcasts nor the creation of some analogue has a bearing on federal-provincial relations or international relations. In the former instance, copyright falls entirely under the jurisdiction of the federal government. Section 91 of the **British North America Act** declares that "the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated," including, in sub-section 23, "Copyrights."<sup>1</sup>

No constitutional provision requires the federal government to consult with provincial governments on matters of copyright. Nor is there any body of case law to encourage federal-provincial consultation on this subject. Insofar as a rediffusion right would concern the domain of broadcasting, federal initiative is not constrained for the reason that broadcasting also falls under federal jurisdiction.

Although the federal government is not obliged to solicit or accommodate the views of provincial governments, it may nonetheless be fruitful to consider the benefits and costs of intergovernmental consultation. At the highest level of abstraction, the federal government's attitude toward the provinces on cable copyright might reflect the federal government's general policy on consulting provincial governments in matters of exclusive federal competence. At a lower level of abstraction, the federal government may consider to what extent a policy of consulting the provinces on cable would be consistent with future directions in the allocation of authority over communications. A decision to involve the provinces in cable copyright policy may also depend on a judgement about the feasibility of reconciling federal and provincial interests and an assessment of the relative import of cable copyright as opposed to other matters in the view of provincial governments.

The desirability of involving the provinces in copyright policy must also be balanced against the urgent need for reform to the **Copyright Act**. Modernizing the law ought to receive the priority consideration it appears to be receiving in view of the enormous technological changes which have been taken place in the culture and information industries.

The introduction of a rediffusion right for broadcasts has implications for foreign relations similar to those for federal-provincial relations. In law, adopting a rediffusion right is of no concern to other countries for the simple reason that Canada has no treaty obligations with respect to rediffusion policy. As the Keyes-Brunet report observed with clarity, Canada is obliged only to provide protection in specific ways for works identified in the Rome (1928) text of the Berne Convention for the Protection of Literary and Artistic Works and not for works identified in later texts, which Canada did not sign. Canada's legal obligations do not require the protection of broadcasts or of sound recordings, performances, and other phenomena. Keyes-Brunet conclude that

this makes it possible, in domestic copyright law, to distinguish convention and non-convention subject matter, as has

been done in the United Kingdom and Australia. If it is considered desirable that protection be accorded non-convention materials, that protection could either be limited to Canadian interests, or extended to other countries on a bilateral reciprocal basis.<sup>2</sup>

The legal principle that Canada is entirely free to chart its own policy for rediffusion rights must be tempered by the political reality that different rediffusion policies may elicit different responses from foreign governments. At the highest level of abstraction, the federal government may consider how alternative rediffusion policies would affect Canada's traditional foreign policy of promoting the observance of equitable international rules of conduct as a means of encouraging the peaceful resolution of international differences. At a lower level of abstraction, the federal government may consider the extent to which different rediffusion policies conform to Canada's objectives of diminishing barriers to international trade. For Canada as well as other countries active in GATT<sup>3</sup> negotiations, reducing the barriers to trade is seen as providing economic efficiency through international specialization as well as preventing war through economic inter-dependence.

At lower levels of abstraction, the federal government may consider its general policy on the acquisition of international copyright obligations. The federal government may likewise consider the possible response of the United States to alternative rediffusion policies and ways of coping with such responses. United States attitudes are particularly important because the new U.S. Copyright Act provides protection for copyright material in broadcasts, including specified Canadian broadcasts. American cable companies have already made payment for the right to rediffuse broadcasts, and the fees to the Canadian Broadcasting Corporation under this act may amount to approximately \$60,000 for the first semi-annual period under the Act. In view of its own new rediffusion policy, the U.S. government may have some expectations about the appropriate rediffusion policy for Canada to adopt.<sup>4</sup>

Apart from their bilateral, foreign policy implications, copyright practices in the United States hold some intrinsic interest for Canadian policy-makers as a potential model to be emulated or avoided. Just as our neighbour's earlier experiences with political independence and federalism influenced the thinking of the fathers of Confederation, the experiences of Americans with their new rediffusion policy are bound to figure in the minds of Canadian policy-makers as they contemplate a policy for Canada.

Some of the implications for Canada-U.S. relations of the new U.S. **Copyright Act** are explored in this chapter. The domestic or within-nation lessons to be learned from American copyright experience are pursued mainly in chapter 7, devoted to **Administrative and Regulatory issues**. Chapter 7 also has a bearing on foreign policy to the extent that the administrative details of the U.S. copyright scheme treat Canadian interests favourably or unfavourably.

The sections that follow are concerned with **Federal Strategy in Federal-Provincial Relations**, **Provincial Views on Cable Copyright**, **Canadian Self-Interest and Multilateral Principles**, and **Canadian Self-Interest and Bilateral Realities**.

#### **FEDERAL STRATEGY IN FEDERAL-PROVINCIAL RELATIONS**

As organizations grow in size, they become more difficult to coordinate, and the federal government is no exception. In practice, the decision by any Department to consult provincial governments on a particular matter tends to depend more on the specifics of the matter and on the outlook of the responsible Minister and his officials rather than on grand principles intended to guide federal interactions with the provinces. However, in the best of all possible worlds, a decision to elicit or accommodate provincial views should reflect federal policy on relations between the two levels of government.

Provincial governments have often decried federal policies which are thought to be insensitive to regional differences or which apparently do not consider the various economic and social objectives of individual provincial governments. Provincial

leaders have sometimes complained of learning from the daily press of new federal programs which would impact dramatically on the budgets and programs of their own provincial governments.<sup>5</sup> A number of provinces have condemned what they consider to be constitutionally improper interventions in provincial domains -- "intrusions," to use the catchword of the day. According to one provincial viewpoint, if only federal intrusions were kept to a minimum and if only federal and provincial roles were disentangled, there would be far less reason for federal and provincial governments to be in conflict.

The annual reports of the Western Premiers' Task Force have given considerable attention to the issue of intrusions. For example, the 1979 Task Force report discussed 57 intrusions in detail, including aspects of the 1977 Bank Act, education, and culture, communications, and referendum legislation. A summary table assigned each of the apparent intrusions to one of four categories: "agreed resolved," "agreed acceptable for now," "continued consultation required," and "basic federal-provincial differences."<sup>6</sup> Seven of the eight items under the rubric of "housing, urban affairs, and land use" were resolved satisfactorily. As the report observed with respect to land policy, "the demise of the Ministry of State for Urban Affairs is expected to result in a less aggressive interest by the federal government in urban land development."<sup>7</sup> All seven issues in communications apparently required continued consultation.

The Western Premiers did not publish a report in 1980, partly because of a sense of diminished urgency about the need for eliminating intrusions. Many intrusions had already been disposed of at federal-provincial talks. In *A Time for Action*, a major statement on federalism published in 1978, the federal government had pledged to work with the provinces in order

to eliminate wasteful duplication of legislation, regulation, policies, programs, or services, and generally to make the effective provision of services by government less costly.<sup>8</sup>

A working group on duplication had been established in the Federal-Provincial Relations Office, a cabinet secretariat.

The federal government accepted in part the provincial viewpoint that federal and provincial roles should be disentangled. If the disentanglement thesis were fully accepted by the federal government, it might follow that provinces should not be consulted at all on the question of cable copyright on the grounds that copyright falls under exclusive federal jurisdiction.

However, Ottawa did not fully accept the disentanglement thesis, and for good reason. The **BNA Act** may assign exclusive powers in one field or another to one level of government or the other. But, in the real world, ostensibly exclusive powers can impinge dramatically on the programs of the other level of government. Consequently, the federal government expressed a general desire to consult provincial governments on intended federal policies, even in some instances of exclusive federal jurisdiction. In **A Time for Action**, Ottawa indicated that it would

take deliberate steps to...[take] fully into account the constitutional responsibilities and priorities of provincial governments, by consulting the provinces when preparing a program that is in an area of shared jurisdiction, or that could have a significant effect - financial or other - on an area of provincial responsibility or an activity within that area.<sup>9</sup>

Consulting the provinces on copyright could be appropriate if the impact of copyright law on provincial activities were thought to be significant. Though copyright and broadcasting are federal responsibilities, copyright may have implications for provincial cultural policies. Copyright may be of interest to those provinces which have attempted to spur indigenous cultural activity as well as to those provinces which operate telephone or cable companies.

It may also be appropriate to consult the provinces in view of the federal government's apparent willingness, expressed in 1980, to satisfy some provincial desires for the devolution of some authority over communication. At the September, 1980 Conference of First Ministers, the Prime Minister offered to share responsibility for cable. In particular, he proposed

to transfer to the provinces authority to determine franchise areas and issue licences; to set subscription rates; to authorize and regulate community, instructional, and pay-tv within the province and related advertising; to regulate the two-way use of cable for business purposes and access to information banks; and to authorize and regulate fire alarm, burglar alarm, and other security services.<sup>10</sup>

Under this proposal, the federal government would apparently retain control over network television, satellite broadcasting, and cable undertakings involving more than one province. Furthermore, Parliament would determine the basic national program service required in cable service. Even if the provinces eventually receive much less authority over cable than proposed by the Prime Minister in fall, 1980, provincial involvement would still be significant.

#### PROVINCIAL VIEWS ON CABLE COPYRIGHT

One configuration of provincial government views which might make consultation with the provinces inadvisable would be unanimous opposition to intended federal action. Where provincial opposition is united, it might not be in the federal government's interest to increase its interactions with provincial governments. Indeed, where the two levels of government are implacably opposed and neither viewpoint is unequivocally preferable, it might not be in the interest of the country as a whole to encourage inter-governmental interaction.

However, where provincial views are heterogeneous and/or inchoate, consultation can be helpful. One obvious benefit is that the federal government may learn of options or approaches which were inadvertently given short shrift in deliberations within its own internal policy process. When provinces are divided among themselves, federal officials can attempt to mitigate provincial disappointments with federal policy by showing the extent to which federal policy attempts to reconcile inter-provincial differences. When provincial views are inchoate, the federal government can use consultation to stimulate greater provincial interest and cooperation in the pertinent domain.

Provincial positions on cable copyright tend to be inchoate and divided. A majority of the provincial governments consulted by us reported that their positions on cable copyright were not yet developed. Two provinces, Manitoba and Quebec, did appear to have views. Manitoba is apparently opposed to the introduction of a rediffusion right, partly on the grounds that cable companies do not necessarily harm broadcasters and partly on the grounds that broadcasting objectives such as greater Canadian content can be achieved by means other than copyright.<sup>11</sup>

The Quebec government has apparently not expressed an official position on rediffusion rights. But, its strong commitment to authors' and creators' rights suggests that this province would be well disposed to a compulsory licensing scheme or other copyright provisions which sought to enhance the financial and non-financial position of the creators of indigenous broadcasts. In recent months, the Quebec government published a scathing indictment of Canadian copyright policy, denouncing the federal government for leaving huge gaps in copyright protection and for treating lightly the need to encourage cultural activity.<sup>12</sup> In the words of the Quebec Minister of Cultural and Scientific Development, culture and copyright are important concerns because "a society which respects itself and aspires to the respect of others gives its creators their just desert."<sup>13</sup>

Quebec's indictment of federal copyright policy not only condemns inaction but it also condemns the federal government's philosophic approach to copyright:

Up to the present time, the rights of some [eg. creators] or of others [eg. consumers] were portrayed too much in terms of conflict, as if to respect one side led inevitably to misapprehension by the other side. The reality to understand and to encourage others to understand is completely different. It is advantageous for the collectivity and for cultural democracy that creators be well cared for. "Author's rights" and "democracy" are not contradictory concepts.<sup>14</sup>

Quebec's statement on copyright makes no reference to a rediffusion right. However, the statement expresses strong support for a panoply of moral and financial rights for creators. The statement argues in favour of a kind of compulsory licensing scheme in photocopying while the government itself has already begun implementing an exhibition right for artists. The views and actions of the government in Quebec City suggest a philosophy of copyright which would view a rediffusion right in a favourable light.

Among the 11 federal and provincial governments in this country, Quebec is not the leading financial supporter of cultural activity. The programs of the federal government are the most developed and best funded, and Ontario compares favourably as well. But, the public statements of the Quebec government reveal a great awareness of the significance of cultural activity for collective identity, collective self-esteem, and collective self-assertion. Successive Quebec governments have been conscious of the value of collective identity and self-assertion as a resource in external relations. By contrast, the English speaking provinces and the federal government have tended to view culture as auxiliary or superfluous rather than as an essential consideration in collective economic and political action.<sup>15</sup> Federal-provincial consultation on copyright might encourage a fruitful exchange of views on the broad purposes to which copyright can be put.

### CANADIAN SELF-INTEREST AND MULTILATERAL PRINCIPLES

In the era after Freud, it may no longer be proper to distinguish sharply between conscious intention and unconscious action. By the same token, it may no longer be realistic to distinguish sharply between self-interest and altruism. When nation-states sacrifice short-term self-interest in order to observe international rules of conduct, these actions are customarily termed altruistic. But, the observance of international codes of conduct can also be interpreted as an expression of long-term self-interest. In the nuclear age, nations benefit from predictable, orderly conduct; the risks associated with disorder are potentially cataclysmic.

Canadian foreign policy has historically included a sense of long-term interest, including a commitment to international order which might be perceived by short-term thinkers as being solely altruistic. Examples of Canadian commitment to long-term international order might include her early entry into World War II, the decision not to develop nuclear forces, the provision of international peace-keeping troops, support for multi-lateral development assistance, reservations about U.S. involvement in Viet-Nam, support for Israel's right to exist, opposition to apartheid in South Africa, and the normalization of relations with the People's Republic of China.

Canadian copyright policy displays a mix of short-term and long-term considerations. A good case could be made that Canada's adherence to the Rome Text of the Berne Convention was harmful to Canadian national interest, in the short-term sense of interest. As a mammoth net importer of copyright material, it is not in Canada's immediate economic interest to incur international commitments for the protection of such material. Following the Economic Council of Canada's important statement on this matter, it has become a conventional wisdom that Canada exercise caution in increasing its international legal obligations for copyright protection.<sup>16</sup>

The Keyes-Brunet recommendation that only Canadian broadcasts be protected could provide additional revenue for indigenous programming without aggravating the Canadian balance-of-payments position in copyright material. From a multilateral perspective,

it is important to consider whether the Keyes-Brunet proposal is consistent with Canada's international obligations in copyright, with Canada's obligations under GATT, and with Canada's traditional foreign policy commitment to the orderly development of relations in the world community.

When **Copyright in Canada** appeared in 1977, the Keyes-Brunet idea of distinguishing between convention and non-convention material caused a minor sensation. Prior to 1977, the potential practical significance of the distinction may not have been fully appreciated by all those who had an interest in the development of Canadian copyright policy. The convention/non-convention distinction is now almost conventional wisdom, having received the approbation of the Canadian Bar Association and of non-Canadian authority on the subject.<sup>17</sup> The federal government is entitled to extend copyright protection to broadcasts which are Canadian and to other Canadian cultural products which are not subject to the particular copyright conventions to which Canada has acceded.

Canada's policy on rediffusion rights must not only take into consideration treaty obligations in copyright but it must also take into consideration general treaty obligations in economic matters. In practice, GATT, whose central purpose is to reduce tariff and non-tariff barriers to trade, constitutes the most significant set of principles governing commerce in the international community. Article I of the General Agreement, "General Most-Favoured-Nation Treatment," provides for all GATT members to be treated alike. Many of the Agreement's remaining articles prohibit specific ways of impeding imports or identify methods of recourse available to countries whose economies have been damaged by conduct forbidden under GATT rules.

Member countries are forbidden to impede imports by means of internal taxes and regulation (article III), discriminatory transit costs (article V), customs valuations based on non-economic considerations (article VII), quotas and licences (article XI), and subsidies for domestic products (article XVI). Other articles in the Agreement authorize various forms of recourse, including suspension of GATT benefits to an offending country.

By definition, the Keyes-Brunet proposal to provide a rediffusion right for Canadian broadcasts entails a distinction between indigenous and foreign broadcasts. An interested foreign country, in practice the United States, might attempt to employ GATT principles as a means of opposing a Keyes-Brunet-type policy. But, opponents of the Keyes-Brunet proposal can receive little comfort from GATT because the General Agreement provides significant exemptions for cultural products. Article III:10 stipulates that "the provision of this article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV." Article IV asserts that films may be protected by means of quotas measured in terms of screen time per theatre per year. Article XX, devoted to general exemptions, permits nations to introduce discriminatory or protectionist measures if these are necessary "to protect public morals," "to protect human...health," or "for the protection of national treasures of artistic or archaeological value."

The fact that the General Agreement permits exceptions for several cultural products suggests that culture, to the extent that it was at all considered by the drafters of GATT, was viewed as a special phenomenon, different from other goods and services traded between countries. Whether or not GATT should be interpreted as providing a blanket exemption for cultural products, the United States seems to have implicitly accepted this view in the past. When Canada needed to justify the CRTC Canadian content quota in the face of U.S. complaint, the federal government argued that quotas are a cultural matter and therefore that GATT's prohibitions did not apply. Either the United States was satisfied with the response or chose to bow to the inevitable because the U.S. apparently took no further action.

The CRTC Canadian content quotas may constitute a more serious form of economic discrimination than would the Keyes-Brunet rediffusion right. A cogent argument could be made that restricting a rediffusion right to Canadian broadcasts would be a form of compensation for the higher costs imposed on Canadian broadcasters and therefore on creators by obedience to CRTC regulation. It would be more difficult to make an argument based on economic equity to justify Canadian content quotas.

While the Keyes-Brunet rediffusion right would be permissible under Canada's international copyright obligations and may well be permissible under GATT, it remains to determine whether discriminating in favour of Canadian broadcasts would be consistent with Canada's long-term interest in the development of international codes of conduct. If cultural products are fully subject to international substitution like ordinary consumer goods, all forms of cultural protectionism would be incompatible with Canada's commitment to greater economic and political inter-dependence in the community of nations. However, culture ought not to be subject to rules of international efficiency. All countries, and especially the small, need to encourage indigenous self-expression for their own sense of collective well-being. Hence, the Keyes-Brunet proposal would not be inconsistent with Canada's traditional commitment to international order and economic integration.

#### CANADIAN SELF-INTEREST AND BILATERAL REALITIES

Canada and the United States may each appeal to GATT principles, to international copyright principles, or to other ideals to justify their respective bargaining positions in bilateral talks. But, in practice the two countries are so closely integrated that their mutual behaviour is more likely to be motivated by specifically bilateral experiences than by multilateral considerations. In particular, the inclusion in the new U.S. **Copyright Act** of a scheme of compulsory licensing for the rediffusion of broadcasts by cable is an important element in Canada-U.S. relations. In what may be viewed as a kind of "loss leader," Congress unilaterally provided legal protection for copyright material in Canadian broadcasts carried by some U.S. cable companies. The Canadian Broadcasting Corporation, the only Canadian claimant under the U.S. law, anticipates receiving approximately \$60,000 in rediffusion payments for the first six months of 1978.<sup>18</sup> The American entertainment industry undoubtedly expects Canadian copyright law to provide reciprocal protection.<sup>19</sup>

In one extreme scenario, the U.S. government could undertake a reprisal if U.S. broadcasts in Canada are not granted the same protection in Canadian copyright law which Canadian broadcasts

are thought to receive in U.S. law. In the recent past, the United States responded to Canada's decision to remove the tax deductible status of Canadian advertising on U.S. border stations by removing the tax deductible status, until recently, of American business conventions held in Canada.

Canadian attitudes towards the bilateral relationship with the United States have tended to be polarized between those people who feared the consequences of any conflict and those who saw no risk at all in conflict. Any conflict with the United States entails some potential cost, but it is possible to consider rationally some of the factors which may influence the outcome of a dispute.

It would not be an easy task to construct a Canadian copyright scheme to provide U.S. interests with the same protection as that enjoyed by Canadian interests in the United States. Insuring parity or equivalence would be difficult because of the ambiguity and complexity of the U.S. scheme of compulsory licensing for rediffusion. According to one principle of fairplay, the United States scheme is equitable and generous. Specified U.S. cable companies must pay for the right to rediffuse copyright material in Canadian broadcasts although Canadian cable companies are not obliged to pay anything to rediffuse U.S. broadcasts. However, according to another principle of fairplay, the U.S. scheme is structurally discriminatory against Canada. The **national treatment** provision of the Universal Copyright Convention (UCC), to which Canada and the United States belong, requires members to treat the copyright material of all other UCC members on an equal basis. Yet, the U.S. selectively imposes compulsory licensing on rediffused broadcasts from Canada (and Mexico) while permitting free market negotiations in the case of other foreign rediffused broadcasts.

The principles embodied in U.S. copyright legislation may be less important to Canada than the actual financial consequences of the legislation as it is administered in practice. Chapter 6, **Administrative and Regulatory Issues**, examines in some detail the implementation of the compulsory licensing scheme for rediffusion established under the U.S. **Act**, and concludes that the American administrative practices may not be favourable to Canadian interests.

The fact that the U.S. licensing scheme may or may not be equitable for Canada in principle and may be discriminatory in administrative practice makes more complicated the task of identifying alternative courses of action for Canada. If the U.S. law were unequivocally equitable or unequivocally discriminatory, then Canada could opt for a correspondingly equitable or discriminatory law or attempt to negotiate a mutually satisfactory solution. However, the fact that the U.S. scheme may carry an appearance of fairplay while being discriminatory in implementation suggests the desirability of considering a variety of sophisticated copyright options.

Four phenomena are likely to influence the U.S. response to Canadian protectionism in cultural policy: (a) the increasing difficulty experienced by the U.S. in securing compliance around the globe, (b) the relative importance of rediffusion rights as compared to energy, water, and other items of bilateral interest, (c) whether the threat to U.S. income is immediate or potential, and (d) the will or determination of the Canadian government to assert its views in the cultural domain. The first two phenomena are beyond the control of the Canadian government, but they do imply that it is becoming easier for Canada to adopt cultural policies at variance with U.S. interests. As Washington becomes more absorbed with problems around the world, as it becomes concerned with continental matters more urgent than culture, it is less likely to react to Canadian protectionist measures in culture and broadcasting.

American reaction to a protectionist rediffusion right is likely to be less vigorous than American reaction to the termination of tax deductibility for advertising on U.S. border stations. The threat to border advertising posed by change in Canadian tax law was serious because it entailed a loss in immediate income for U.S. border broadcasters. By contrast, a rediffusion right limited to Canadian broadcasts involves the loss of potential income. The lost income would be very potential because U.S. authorities could never be certain whether the alternative to a Keyes-Brunet right was a non-discriminatory right or no right at all.

If the Canadian government asserted progressively more strongly a protectionist policy for culture, it would likely

encounter less and less resistance. It is certainly true that broadcasters, especially border broadcasters, are influential, indeed disproportionately so, in the American political system. The vigorous reaction of the United States to previous economic threats to border broadcasters is explained by the influence of these broadcasters rather than by the importance of their plight to American national interest. However, small influential interest groups exercise their maximum influence on issues which do not involve high public salience. Once an issue becomes salient on a public agenda, pressure group influence tends to be supplanted by calculations of national interest. By any calculation, there exist at least half a dozen continental issues more important to the United States than the absence of income from potential rediffusion rights in Canada.

An American response might be attenuated if Canada opted for an analogue of the Keyes-Brunet proposal (i.e. outside copyright law) or the copyright liability model recommended by the **Economic Council Report on Intellectual and Industrial Property**. As noted above in Chapter 4, the Economic Council recommended that copyright protection be provided to non-commercial broadcasters. A right of this kind would provide financial benefits to provincially owned networks, to the CBC for the non-commercial portion of its schedule, and to U.S. public television. Under this proposal, copyright payments would be largely retained within Canada but would not be based on protectionist criteria.

### CONCLUSION

The chapter began by noting that the federal government's publicly stated strategy for conducting federal-provincial relations recognized the benefits to be had from consulting the provinces in areas of exclusive federal jurisdiction. The federal government recognized that legal notions of exclusivity did not conform to the reality of overlap in almost every domain of government activity.

From consulting the provinces, the federal government may gain an opportunity to be exposed to new ideas, an opportunity to increase the salience of culture in the minds of provincial governments, and an opportunity to concert federal and provincial

activity in support of indigenous culture. The federal government could gain an opportunity to show that federal-provincial differences with respect to the substance of policy reflect real inter-provincial and inter-regional differences rather than the malevolence or incompetence attributed to Ottawa by some provincial spokesmen.

We are not suggesting that all federal-provincial consultation should be assymetrical with the federal government consulting the provinces and not vice-versa. Consultation happens to be assymetrical in the particular case of a rediffusion right because jurisdiction over copyright and broadcasting is solely federal while jurisdiction over cable is substantially federal.

The federal government already does satisfy the important minimum conditions necessary for consultation, namely that its policy process is open. The Department of Consumer and Corporate Affairs has for years made public various research studies on copyright and has welcomed briefs from artists, performing rights societies, broadcasters and other interested parties. In July, 1981, the Department of Communications publicly established a task force on copyright law and culture. The relatively open, public nature of copyright deliberations within the federal government facilitates representation by all Canadians, including provincial governments.

The present chapter considered foreign policy from a multilateral perspective. The chapter concluded that a protectionist rediffusion right of the kind recommended by Keyes-Brunet would be allowable under Canada's treaty obligations with respect to copyright and would be substantially allowable under Canada's GATT obligations. It was also argued that protectionist policies in culture would not be inconsistent with Canada's traditional foreign policy commitment to order and codes of conduct in the international community.

Finally, the chapter considered foreign policy aspects of the rediffusion right from a bilateral perspective. Several factors suggest that United States reaction to a Keyes-Brunet-type rediffusion right could be less vigorous than past reaction to

the fiscal discouragement of Canadian advertising on U.S. border stations. First, the United States has many concerns more important than rediffusion payments, including energy, water and other continental agreements. Secondly, the normally considerable influence in Congress of U.S. broadcasters as an interest group may recede if Canada asserts more strongly protectionist cultural policies. If Canada-U.S. conflict over cultural policy becomes more salient, the U.S. responses will be determined less by pressure group influence and more by rational calculations of U.S. national interest. Other continental issues are more important to the U.S. national interest. Thirdly, American reaction to a Keyes-Brunet rediffusion right would likely be less vigorous than has been U.S. reaction to the discouragement of border advertising because the Keyes-Brunet proposal entails a loss of potential, hypothetical or even illusory income to U.S. copyright owners while Canadian tax policy actually did harm to the real, current income of border broadcasters. After all, Canada could conceivably enact no rediffusion right at all.

The Canadian government could attempt to reduce the likelihood of difficulties with the United States by adopting a rediffusion right analogue outside copyright law such as a system of grants. Alternatively, the federal government could adopt a copyright liability model which, though not formally protectionist, does in practice retain most copyright payments in this country. The Economic Council proposal to protect only non-commercial broadcasters would serve such a purpose.

Until this point, our concern was to examine the multilateral and bilateral implications of establishing a right for Canadian broadcasts in the form of a compulsory licensing scheme or other statutory requirement for payment by cable companies. The objective of requiring payment by cable companies is at the core of the U.S. **Copyright Act** and the Keyes-Brunet proposal. The Keyes-Brunet proposal differs from the U.S. copyright law in that the U.S. law authorizes payment to copyright holders whereas Keyes-Brunet propose payment to broadcasters (and only those which are Canadian). Whether broadcasters or copyright holders are to receive payment does not have many foreign policy implications. But, these few foreign policy implications are discussed below in Chapter 10, **Conclusions and Recommendations**.

The broadcast material for which a right is to be granted may have substantial foreign policy and domestic implications. Keyes-Brunet recommend "that Canadian broadcasters be granted a right to authorize simultaneous rediffusion of **their Canadian broadcasts.**"<sup>20</sup> If the phrase, "their Canadian broadcasts" is taken to mean "their Canadian content broadcasts," then little in the preceding analysis of foreign policy implications needs to be changed.

However, if the phrase, "their Canadian broadcasts", is taken to mean "broadcasts in Canada of material for which they hold exclusive Canadian rights," the Keyes-Brunet proposal may be interpreted as providing for the non-simultaneous substitution of broadcasts. Akin to simultaneous substitution as authorized by the CRTC, non-simultaneous substitution would authorize cable companies to substitute on an American channel a Canadian broadcaster's version of an American program for which the Canadian broadcaster had acquired sole Canadian rights. For example, if a Canadian broadcaster and a U.S. border broadcaster both carried an episode in the *All in the Family* series within, say, a 7-day period, and if the Canadian broadcaster could demonstrate that he owned the exclusive Canadian rights to the episode, the cable company would be authorized to delete the American version or substitute the Canadian version on that channel. Non-simultaneous substitution could also be used between domestic markets within Canada where a local broadcaster could show that he owned the local rights.

Non-simultaneous substitution would help Canadian broadcasters substantially by increasing their audiences while doing harm to U.S. border stations. Because of the anticipated harm to border stations, the U.S. government may be expected to react strongly. However, two factors may attenuate the U.S. response. First, not all U.S. interest groups would stand to lose. Owners of U.S. programs may expect increased revenue from sales to Canadian broadcasters as a result of the increased audiences available to Canadian broadcasters. Meanwhile, revenue to U.S. program owners from border broadcasters would not decline because program sale prices to border broadcasters are based on the size of indigenous local U.S. markets. Secondly, the U.S. would not have a strong moral-legal basis for protest because the

practice of non-simultaneous substitution flows from the internationally recognized copyright principle that rights can be sub-divided nationally and regionally.

## NOTES

1. A useful consolidation of the British North America Acts appears as an appendix in Richard J. Van Loon and Michael S. Whittington, *The Canadian Political System* (Toronto: McGraw Hill Ryerson, various dates and editions).
2. A.A. Keyes and C. Brunet, *Copyright in Canada: Proposals for a Revision of the Law* (Ottawa: Consumer and Corporate Affairs Canada, 1977), p. 21.
3. The General Agreement on Trade and Tariffs.
4. On this point, see the address by John Meisel, CRTC Chairman, to the Canadian Cable Television Association, Vancouver, 28th May, 1980. Chapter 7, **Administrative and Regulatory Issues**, below argues that Canadian copyright interests may have suffered under the actual administration of the U.S. licensing scheme.
5. The scholarly literature on federal-provincial relations, irritations, and disputations is increasing. Some recent examples include R.B. Byers and Robert W. Reford, eds., *Canada Challenged: The Viability of Confederation* (Toronto: Canadian Institute of International Affairs, 1979), Garth Stevenson, *Unfulfilled Union* (Toronto: Macmillan, 1979), Douglas Auld et al, *Canadian Confederation at the Crossroads* (Vancouver: Fraser Institute, 1978), and Gil Rémillard, *Le Fédéralisme Canadien* (Montréal: Québec/Amérique, 1980).

6. Western Premiers' Task Force on Constitutional Trends, **Third Report** (March, 1979), under the chairmanship of the Hon. K. Rafe Mair, pp. 44-45. See also the **Second Report** (April, 1978) and **Western Trade Objectives**, Western Premiers' Conference Position Paper, April, 1978.
7. p. 22.
8. The Right Honourable Pierre Elliott Trudeau, **A Time for Action: Toward the Renewal of the Canadian Federation** (Ottawa: Supply and Services, 1978), p. 17.
9. p. 17. The federal government also observed that "where a government gives an opportunity to the other governments to comment on proposed legislation, policy or programs and where it pays attention to their comments -- without necessarily accepting them fully--the action that government eventually takes is likely to prove more effective..." p. 15.
10. "Notes for a Statement by the Prime Minister of Canada on Communications," Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, September 8-12, 1980, pp. 3-4, document 800-14/309.
11. Conversation with Doug Smith, Assistant Deputy Minister, Communications, Department of Consumer, Corporate and Internal Services, Government of Manitoba, December, 1980. For a general provincial view of cable, see "Consensus Position of Provincial Governments regarding the Report of the [CRTC] Committee on the Extension of Service..." (November 28, 1980).
12. Gouvernement du Québec, Développement culturel et scientifique, **La Juste Parte des Créateurs: pour une amélioration du statut socio-économique des créateurs québécois** (Québec: 1980).
13. *Ibid.* p. vi. Our translation.
14. *Ibid.*, p. 41. Our translation. The French text reads: "Jusqu'ici, les droits des uns et des autres se sont trop exprimés en termes de conflit, comme si le respect des uns conduisait fatalement au mépris des autres. La réalité à saisir et à faire comprendre est tout autre. Il est avantageux pour la collectivité et pour la démocratie culturelle que les créateurs soient bien traités. Droit d'auteur et démocratie ne sont pas des concepts contradictoires."

15. For official views of Quebec cultural and communications policy, see *Le Ministre d'Etat au Développement culturel, La Politique québécoise du développement culturel*, 2 vols (Québec: Editeur officiel, 1978); Department of Communications, *Toward a Quebec Communications Policy* (Québec: Editeur officiel, 1971); *Le Québec - maître d'oeuvre de la politique des communications sur son territoire* (Quebec: Editeur officiel, 1973, reprinted 1980); and the opening address by Clément Richard, Quebec Minister of Communications, to the Conference of Ministers of Communication, Vancouver, November 26-27, 1980. For the argument that culture is often viewed as auxiliary or superfluous to the main activities of the federal government, see Bernard Ostry, *The Cultural Connection: An Essay on Culture and Government Policy in Canada* (Toronto: McClelland and Stewart, 1978).
16. Economic Council of Canada, *Report on Intellectual and Industrial Property* (Ottawa: Information Canada, January, 1971).
17. See the CBA brief to Consumer and Corporate Affairs, filed November 30, 1979, pp. 7-13 and James Lahore, *Copyright* (Sydney, Australia: Butterworths, 1977). Former Counsellor to the World Intellectual Property Organization, Lahore observes categorically that "neither the Berne Convention nor the Universal Copyright Convention recognized a copyright in television and sound broadcasts." (p. 15). Papers prepared by Barry Torno for Consumer and Corporate Affairs provide a contrary view. See Conrad Winn, "Department of Secretary of State - Potpourri or Cultural Mandate," in G. Bruce Doern, ed. *Spending Tax Dollars* (Ottawa: Carleton School of Public Administration, 1980), p. 162, n. 14.
18. U.S. copyright practices are discussed, below, in Chapter 7, **Administrative and Regulatory Issues**.
19. On this point, see the address by John Meisel to the Canadian Cable Television Association, Vancouver, 28t May, 1980.
20. *Copyright in Canada*, p. 144. Emphasis added.

## CHAPTER 7

# Administrative and Regulatory Issues

*by Conrad Winn*

### INTRODUCTION

In contrast to the philosophical and legal thought of continental Europe, Anglo-Saxon pragmatism and the common law tradition have seen a great value in informality, flexibility, and even in imprecision. The political history of Great Britain, the world's oldest surviving democracy, provides evidence in favour of pragmatism and flexibility, given certain deeply seated principles of justice. In Britain, governmental and nongovernmental organizations obey long cherished rules of fair political conduct while operating within the framework of a constitution which is not even written.

By its nature, copyright law is written. By its nature, a compulsory licensing scheme in copyright must be identified explicitly in written law, if not necessarily fully described. Moreover, the recent American experience with compulsory licensing in rediffusion suggests that statutory provisions for compulsory licensing should be formal, clear, unambiguous, and detailed. Little should be left to delegation. The U.S. Copyright Act of 1976 provides a relatively clear and detailed description of how royalties are to be generated. The legislation contains an explicit timetable as well as an explicit formula by which cable systems must calculate the sums they

should deposit with the Register of Copyrights. Larger cable systems must calculate their royalty obligations according to their gross revenues and carriage. Considering that the licensing scheme was introduced only recently, comparatively few problems have been experienced with respect to the generation or payment of royalties by cable systems to the Register of Copyrights.

While the U.S. Act identifies clearly who should pay and in what amounts, it does not identify with the same clarity who should receive payments and in what amounts. For example, section 111 (d) (4) calls for payment to "copyright owners who claim that their works were the subject of secondary transmission by cable..." The legislation states that payment should be made only for "non-network" programming rediffused outside the locality of origin. The legislation goes on to describe what course of action should be undertaken by the designated regulatory authority, the Copyright Royalty Tribunal, if a "controversy" about the allocation of royalties should arise. However, the law does not describe fully how a "copyright owner" should be identified, a question of considerable importance since any given broadcast may embody several different sources of creativity. Nor does the law provide a formula for apportioning royalties. These tasks of identifying individual beneficiaries and apportioning monies are delegated to the Tribunal.<sup>1</sup>

In practice, the U.S. Copyright Royalty Tribunal has had great difficulty in determining a formula for allocating royalties from rediffusion. It did make an initial judgement at a "macro" level, apportioning monies among coalitions of copyright owners such as the Motion Picture Association of America and allied program syndicators. But, even that initial judgement at the macro-level is being attacked before the courts, notably by the National Association of Broadcasters in the U.S. Court of Appeals, District of Columbia Circuit. Meanwhile, the Tribunal is hoping that the various coalitions and individual claimants will reach consensual agreements with respect to "micro" allocations among individual claimants. By mid-1981, royalties from 1978 had not been received by copyright owners. The Tribunal hoped that some portion of undisputed royalties could be distributed, but that wish was being challenged by the

CBC and other claimants who wanted the resolution of disagreements to take place in advance of any distribution.

In principle, some of the difficulties experienced in the United States could be avoided if Canada eschewed a system of compulsory licensing. Without compulsory licensing, a copyright act would not need to specify formulae for royalty generation and allocation. The Keyes-Brunet proposal entails a system of compulsory licensing. **Copyright in Canada** recommends

that the [proposed Canadian] Copyright Tribunal fix the appropriate fees and establish the necessary safeguards to ensure the equitable assessment, collection and distribution of royalties...<sup>2</sup>

In practice, compulsory licensing is desirable because of the large number of signals available for secondary transmission. To opt for free market negotiation between individual cable companies on the one hand and broadcasters and/or copyright owners on the other hand is to risk chaos.

The content of this chapter draws substantially on U.S. experience. American experience is important because the U.S. Act is the first attempt to impose a system of compulsory licensing in rediffusion and because the U.S. Act extends copyright protection to foreign broadcasts. Certain Canadian and Mexican broadcasts are furthermore encompassed in the U.S. scheme of compulsory licensing and are almost treated as if they were domestic American broadcasts.

The sections that follow are concerned with the generation of royalties, the allocation of royalties, future regulatory adjustments, and the management of disputes. Each of these themes is discussed, first, with respect to American experience and then, separately, with a focus on Canadian needs.

Before coming to a conclusion, the chapter discusses briefly some implications for communications policy and the role of the CRTC which arise from the Keyes-Brunet proposal to assign

authority for the regulation of rediffusion royalties to a new Copyright Tribunal.

#### GENERATING ROYALTIES: THE U.S. CASE

The U.S. **Act** provides for the generation of royalty payments in six month periods, and identifies clearly who must pay and in what amounts. Small cable systems are treated differently from and more favourably than large systems. System size is determined by the volume of gross receipts from basic services, excluding for example revenue from installation or from the use of cable for medical purposes or for crime prevention. The 1976 **Copyright Act** singled out two classes of small systems for preferential treatment: those with gross semi-annual receipts of less than \$80,000 and those with receipts between \$80,000 and \$160,000. For both of these classes of small systems, royalty payments were to be calculated on the basis of receipts only, without a consideration of carriage.

Effective January 1, 1981, the Copyright Royalty Tribunal amended the threshold value of gross receipts for defining membership in the small, preferentially treated classes of cable systems. Henceforth, the two categories shall be determined by gross receipts (a) equal to or less than \$107,000 and (b) between \$107,000 and \$214,000.<sup>3</sup>

The majority of cable systems are those which had semi-annual receipts equal to or greater than \$160,000 in the years 1978-80 and equal to or greater than \$214,000 after January 1, 1981. For these large systems, royalty payments to the Register of Copyrights are based on gross revenue from basic broadcast services and on the duration and types of programs rediffused into a local area from outside. Basic broadcast services are defined so as to exclude the medical, crime prevention and other auxiliary services provided by many cable systems. Only non-network programs imported into a locality require royalties to be paid. The rediffusion into a locality of broadcasts by CBS, ABC, and NBC affiliated stations generates royalties only in proportion to the value of non-network programming carried by these affiliated stations. The rediffusion into a locality of non-network programming on a network-owned station, on a network

affiliate, or on an educational station requires fewer royalties to be paid -- exactly 4 times fewer -- than is the case for non-network programming on commercial channels independent of the three U.S. networks. The stations of the CBC are defined as independent commercial stations and are therefore among the most expensive for cable systems to carry.

The percent of gross revenue to be paid is determined by a cable system's carriage as defined by a formula for "distant signal equivalents." Each cable system must calculate the proportion of non-network programming carried by each of the stations whose broadcasts it rediffuses into a locality. A distant signal equivalence must be calculated for the cable system as a whole. Where either a network station or an educational station carried, say, 30 percent non-network programming, a distant signal equivalence (DSE) of 0.3 times  $0.25 = 0.075$  would arise. Where an independent commercial station also carried 30 percent non-network programming, a DSE of  $0.3 \text{ times } 1.0 = 0.3$  would arise. For the same volume of non-network programming, an independent commercial station requires 4 times the payment by cable systems than would be the case for network or educational stations. A cable system would have a total DSE of 1.075 if it carried one non-independent station providing 30 percent non-network programming ( $0.3 \text{ times } 0.25 = 0.075$ ) plus one independent station with 100 percent non-network programming ( $100 \text{ percent time } 1.0 = 1.0$ ).

Once a cable system has calculated its distant signal equivalence, it must translate its distant signal equivalence into a percentage figure which can be applied against its gross income from basic broadcast services. The 1976 Copyright Act stipulated that the first DSE would entail a cost to the cable system of 0.675 percent of gross while the second, third, and fourth DSE's would each entail an additional 0.425 percent of revenue. Subsequent DSE increments of 1 would entail additional payments of 0.2 percent of gross. Effective January 1, 1981, the Copyright Royalty Tribunal increased these rates, ostensibly to keep up with inflation. Thus, the first DSE now costs 0.817 percent of gross while the second, third, and fourth DSE's cost 0.514 percent of gross. Subsequent DSE's each require royalty payments of 0.242 percent of gross.<sup>4</sup>

Canadian television signals rediffused within 150 miles of the Canadian border or north of the 42nd parallel, whichever is more southerly, are subject to compulsory licensing. Otherwise the rediffusion of Canadian broadcasts requires a case by case negotiation of royalty payments. By virtue of a "grandfather clause," an exemption from payments is provided for cable systems in respect of Canadian broadcasts which were first rediffused by them prior to April 15, 1976.

Because of the precise detail with which the U.S. **Act** describes the generation of payments, relatively little controversy surrounds the interpretation of this aspect of the process. Certainly, the generation of royalties engendered less controversy than the subsequent allocation of royalties. Approximately \$12 million plus accumulating interest has been raised for the 1978 year. However, there is some evidence that the complexity of the formulae involved has encouraged some administrative error or, at the very least, some ambiguity and uncertainty with respect to some calculations of payment. There is some evidence that the accounting staff of some cable systems have not been sufficiently skilled to cope with the formulae for royalty generation established in the law. Several cable systems appear to have **overpaid**.<sup>5</sup>

Problems of human error in mathematical calculations were not limited to the matter of royalty generation. Some of the proceedings of the Copyright Royalty Tribunal bogged down over apparently simple matters such as which stations and which programs were actually carried by a given cable system during a given period and with what frequency. Because of a concern over the reliability of different statistical data bases, different interested parties in Tribunal deliberations have resorted to separate data collections. Even the data base on cable carriage developed by the private *bi* Associates, based on the formal reports of cable systems and long considered the most reliable, has not been entirely free of error.

#### **GENERATING ROYALTIES: IMPLICATIONS FOR CANADA**

The two most salient lessons from the U.S. experiences are that statutory provisions for royalty generation should be detailed and simple. American provisions for generating

royalties produced a moderate amount of controversy, particularly when compared to the controversy which has arisen over the subsequent allocation of royalties. One reason for the moderate level of controversy is that the royalty burden was not perceived to be enormous. However, another reason for the only moderate level of controversy is that, once the law was enacted, it was difficult for a dispute to arise because the law was clear.

The generation of royalties has entailed some apparent administrative error, which the Tribunal has sought to rectify. The possibility of administrative error in a Canadian licensing scheme could be diminished by resorting to simple formulae.

In the American legislation, the rediffusion of non-network programming on independent stations engenders four times the royalty payments engendered by the rediffusion of non-network programming on network stations or on educational television. The distinction is not reflected in the subsequent allocation of royalties. The copyright owners of non-network programs on rediffused independent broadcasts do not receive four times the royalty rate paid to the copyright owners of non-network programs carried on the rediffused broadcasts of network or educational stations.

Insofar as the 4:1 ratio in royalty generation is not replicated in royalty allocation, the American licensing scheme has the effect of discriminating against the broadcasts of independent stations. Independent stations are more costly for cable systems to rediffuse. Yet, the owners of non-network programs on independent stations do not receive a correspondingly higher rate of royalties. Emulating this American practice in a Canadian licensing scheme may not be desirable because Canada's broadcasting objectives are not necessarily fulfilled by discriminating against independent stations.

Canadian law could extend the 4:1 ratio to the allocation of royalties, in which case the owners of programs on independent stations would be compensated in proportion to the disincentive against the rediffusion of their broadcasts. The **Copyright Act** might define "network" stations as those of the CBC and CTV and "nonnetwork" stations as all others. Unfortunately, if

American broadcasts were encompassed in such a scheme, the rights' owners to American broadcasts would be the principal beneficiaries.

Under the current American scheme, the generation of royalties could be administered more simply if all stations were treated alike. Calculations would be subject to less error if cable systems paid the same incremental increase for each additional distant signal equivalent. Administrative convenience would be aided by requiring payment for all stations and not just those imported from outside a local area. If Canadian copyright law were to give protection to U.S. broadcasts, protecting local as well as distant signals would augment the proportion of royalties retained in Canada.

#### ALLOCATING ROYALTIES: THE U.S. CASE

The provisions for royalty allocation in the American licensing process are a contrast to the provisions for royalty generation. The provisions for allocation are imprecise and ambiguous resulting in lengthy deliberations by the Copyright Royalty Tribunal, lengthy representations by interested parties, various legal initiatives before American courts, and seemingly interminable delays in achieving a firm outcome.

One could attempt to summarize in full the Tribunal's extensive public deliberations. However, such a task would serve a moot purpose because the extensive deliberations did not yield a set of principles or guidelines which can be said to have helped determine the Tribunal's initial apportionment at a macro level.

The Tribunal's initial macro level allocation can be seen partly as an attempt to reconcile the various claims and counter claims of various coalitions of ostensible copyright owners. Indeed, the Act seems to have foreseen the allocation process mainly as an exercise in bargaining. In 111 (D) (5), the Act identifies three procedures for distributing royalties. According to the first procedure, "any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and

file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." The second and third procedures govern how the Tribunal should conduct itself in the absence or in the presence of a "controversy" or disagreement among claimants.

In practice, the National Collegiate Athletic Association asked that at least 20 percent of all royalties be granted to sports claimants as a group while the Professional Sports Claimants requested that the amount be in the 25-30 percent range. The two sports groups claimed that each figure was based on a "marketplace" valuation of sports programs compared to other redifused programs. Using its own basis of calculation, the Motion Picture Association of America sought 80 percent of the royalty pool on behalf of program syndicators, independent producers, and other members of its coalition. PBS and the Christian Broadcasting Network asked for 7-12 and 4.7 percent, respectively, on the basis of air time. Other claimants included: the American Society of Composers, Authors, and Publishers; cartoon and character claimants; and Broadcast Music Inc.

The CBC was greatly concerned that the Tribunal give due consideration to ownership of copyright. Its submission to the Tribunal dated 27 July, 1979 stated:

The Canadian Broadcasting Corporation respectfully submits that the **first consideration** to examine is entitlement. Only claimants as defined by the Act, and no others, are entitled to receive a share of the residual amount of the royalty fund remaining after legal deductions have been made.<sup>6</sup>

The Corporation wanted the matter of copyright ownership to be considered carefully at the outset because the Motion Picture Association of America, the Joint Sports Claimants, and possibly other coalitions appeared to request royalties for programs in which they did not hold rights. In many instances, the members of the MPAA had already sold exclusive broadcast rights to local broadcasters, in which case the broadcaster had a rightful claim

to royalties, not the MPAA member. The Joint Sports Claimants appear to have sought royalties for broadcasts involving NHL hockey, the Toronto Blue Jays, and the Montreal Expos. Yet, the CBC has been the sole copyright owner of the CBC broadcasts of the Canadian games of these clubs.<sup>7</sup>

At the highest level of generality, the CBC wanted the Tribunal to consider seriously the question of copyright ownership because, unlike American broadcasters, the CBC owns the rights to a large number of its programs. On the basis of its strong copyright position and on the basis of the 4:1 royalty generation ratio weighing "independent" stations more heavily, the CBC could have expected substantial royalties from the licensing process. But, this was not to happen.

At the macro level, the Tribunal apportioned the royalty pool of approximately \$12 million plus accumulated interest in the following manner: 75 percent to the Motion Picture Association of America and other program syndicators; 12 percent to all sports claimants; 5.25 percent to PBS; 4.5 percent to music performing rights societies; 3.25 per cent to the National Association of Broadcasters; and zero to National Public Radio.

At present, the Canadian Broadcasting Corporation stands to receive approximately \$60,000 in royalty payments from the pool collected for the first semi-annual period in 1978. This sum arises from the willingness of the Motion Picture Association of America to grant the Corporation some of its 75 percent share and from the willingness of the National Association of Broadcasters to grant the CBC a portion of its 3.25 percent share. One piece of evidence of the informality with which the principle of copyright ownership was treated is that the MPAA received such a large portion of royalties and shared so little with the CBC even though the CBC purchased exclusive rights for Canada of so many of the programs of which MPAA made blanket claims. Another piece of evidence of the informality of the process is the CBC stations were classed as "independent" and hence not network stations in royalty generation; but the CBC was later expected to share royalties with the National Association of Broadcasters, representing American commercial stations, and not with PBS. Still more evidence of informality is that the

Joint Sports Claimants refused outright to share royalties with the CBC even though the CBC owns the rights to a very substantial amount of sports programming.

Twenty-two different CBC television stations and 14 different CBC radio stations were retransmitted by U.S. cable systems in the first half of 1978.<sup>8</sup> The Corporation calculated that it should receive \$235,407.13 in royalty payments. This figure was derived from

a formula based on aggregate duration of secondary transmission of claimants' distant non-network signals or works on each cable system, weighted according to the DSE's earned by each signal and with equal value given to radio and television.<sup>9</sup>

The actual sum requested by the Corporation may have been a low estimate because it was calculated in mid-1979 when all cable system information may not have been fully available.

One year later, in July, 1980, the CBC requested 6.5 percent of the royalty pool for itself and suggested percentages for other claimants. The Corporation made a strong case for itself on the grounds of its substantial role as a producer and on the grounds of its DSE status in royalty generation. The Corporation made a cogent argument that the MPAA should receive 50 percent rather than 80 percent of the pool because its members did not really own the rights to many of the programs to which they laid claim.<sup>10</sup> Success would have earned the Corporation approximately one million dollars in royalties annually. (See table 6.)

The Tribunal's first semi-annual apportionment is before the courts. But, it is noteworthy that other potential Canadian claimants have either not gone before the Tribunal or have been unsuccessful. Like its American counterpart, National Public Radio, CBC Radio has been apportioned no royalties although the **Act** specifically encompassed radio.

**TABLE 6**  
**REQUESTED AND AUTHORIZED**  
**SHARES OF ROYALTY POOL,**  
**SELECTED CLAIMANTS, 1978**  
**(in percent)**

	Requested by Claimant	Suggested by CBC	Authorized by Tribunal
Motion Picture Association of America	80	50	75
National Association of Broadcasters	21	15	3.25
Sports Claimants	20-30	12	12
Public Broadcasting Service	7-12	7	5.25
Canadian Broadcasting Corporation	6.5	6.5	less than 0.5%*

\* Based on CBC's agreements with MPAA and NAB to receive portions of their allocations.

#### **ALLOCATING ROYALTIES: IMPLICATIONS FOR CANADA**

From Canada's perspective, the single most important aspect of the American experience may have been the absence of clear instructions in the U.S. Act to govern substantive rather than processual matters in royalty allocation. The delegation of

substantive responsibility for royalty allocation to the Tribunal must go some distance in explaining the protracted controversy on the matter, the subsequent resort to the courts, and the apparent failure of royalty allocations to reflect with precision the pattern of copyright ownership.

Any Canadian **Act** should be much more precise and directive. Nonetheless, it must be conceded that the unsatisfactory outcome is also partly explained by the composition of the American Tribunal, consisting in part, at least, of patronage appointees who need not have any expertise in copyright, communications or public policy-making. The staff of the new Canadian Tribunal proposed by Keyes-Brunet would likely be more expert and professional, as is the situation in the extant Canadian Copyright Appeal Board. Canadian laws and traditions respecting public service appointments have tended to give a greater encouragement to professionalism and a somewhat lesser place for patronage.

When regulatory delegation is combined with patronage appointments, informal decision-making may occur. In the particular case at hand, the most informal and unsatisfactory decision was the Tribunal's failure to confront directly the issue of who does in fact own broadcast rights to programs. When decisions by a United States regulatory authority are reached on an informal basis, Canadian economic interests are more likely to suffer. Informality means that the rigorous application of rules takes second place to the often unspoken values, beliefs, and symbols of American culture. In retrospect, it is not entirely surprising that the Motion Picture Association of America received the lion's share of royalties and was not obliged to prove its case for copyright ownership. The Hollywood nexus of movie stars, production houses, and program syndicators has always had a great appeal to the American imagination.

The Canadian government should consider investigating more fully the degree to which the American process discriminates against Canadian interests. Information about the administrative, legal, and allocative biases against Canadian interests could be used to mitigate U.S. government reaction to Canadian initiatives in copyright and in other cultural and broadcasting domains.

One positive lesson provided by the American experience is that it is possible to allocate royalties to claimants other than broadcasters. Authorities for communications in both Canada and the United States have given frequent thought to the possibility of encouraging better programming. The U.S. Copyright Royalty Tribunal also considered whether royalty allocations could be used to encourage improvements. In practice, there exist two (conflicting) notions of quality programming: (a) programming appreciated by small, often well educated segments of the television audience, and (b) programming appreciated by a large mass audience. By its nature, copyright is too blunt an instrument to be used to encourage quality programming with much discrimination on a program by program basis, especially with respect to programming from small audience segments. The encouragement of quality programming for specialized audiences requires a substantial degree of artistic and cultural knowledge and also a substantial amount of administrative latitude. But, to be effective, a copyright law should require as little information as possible and should permit the smallest amount of administrative discretion.

Though copyright is not ideal for making many microlevel distinctions among different types of programs, copyright royalties can be directed to those producers and/or broadcasters who normally develop the kinds of programming desired in communications policy. Canadian content broadcasts are one type of programming that has been considered a priority in the **Broadcasting Act** and in communications policy generally. If some broadcasters are more likely to carry indigenous Canadian content than others, this fact may be important to consider in determining who should benefit from royalties under compulsory licensing. The Keyes-Brunet solution was to protect "Canadian broadcasters... (with respect to) their Canadian broadcasts."<sup>11</sup> This issue will be considered more fully in the concluding chapter.

Independently produced Canadian programs are a second type of programming that has been considered a priority in broadcasting policy. The CRTC has frequently urged the networks to turn to independent programming. On the occasion of CTV's licence renewal in 1973, for example, the Commission declared that

it remains convinced that independent production sources can make valuable contributions to the Canadian broadcasting system...[and that] the Canadian networks have a responsibility to help make this possible.<sup>12</sup>

More recently, the CBC has undertaken to purchase more independent productions. An implicit and sometimes explicit assumption is that independent producers can be a major source of creative thought and a spur to cultural freedom.<sup>13</sup> Whether and how independent producers can be helped by rediffusion royalties is not pursued in the Keyes-Brunet proposal. Independent producers may not have been considered to be as worthy of public concern four years ago when the Keyes-Brunet report appeared as they are today because the subsequent activity of the Canadian film industry suggested new options and possibilities. The feasibility of earmarking rediffusion royalties for independent producers is explored in the concluding chapter.

#### FUTURE REGULATORY ADJUSTMENTS: THE U.S. CASE

In Sec. 801 (b)(2)(A), the U.S. **Act** establishes detailed guidelines for changes in royalty generation over the life-span of the legislation but permits the Tribunal to exercise considerable discretion with respect to royalty allocation. The **Act** permits the rates paid by cable systems to

be adjusted to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service...to maintain the real constant dollar level of the royalty fee per subscriber.

In principle, if rates paid by subscribers to cable systems keep up with inflation, the DSE royalty rates paid by the systems cannot be changed. Furthermore, the Tribunal is explicitly prohibited from increasing the DSE rates paid by cable systems merely in order to maintain a constant royalty pool in the event of declining average DSE's per subscriber.

By contrast, the Tribunal is granted substantial discretion with respect to changing royalty allocations. For example, the Tribunal has complete latitude to change payout rates in order to cope with the effects of "any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity."

#### **FUTURE REGULATORY ADJUSTMENTS: IMPLICATIONS FOR CANADA**

It would make sense to grant a Canadian regulatory authority such as the Tribunal proposed by Keyes-Brunet some authority to adjust royalty rates both in generation and in allocation. However, American experience suggests that the latitude given a Canadian regulatory authority should be limited and that legislation should identify clearly the criteria by which the authority should effect adjustments. With respect to generation rates, two important criteria could be inflation and the profitability of cable systems.

With respect to allocation, it is difficult to determine the precise criteria for regulatory adjustment which should be imbedded in the **Copyright Act** before knowing the details of a particular rediffusion licensing scheme to be adopted by Parliament. Generally, the regulatory authority should not be granted much latitude. It may make sense for Cabinet to retain residual regulatory authority because regulatory adjustments may be required from time to time to take into consideration changes in Canada-U.S. bilateral relations and/or changes in Canada's broadcasting needs. However, there are at least two possible views on the desirability of granting a residual role to Cabinet. If Parliament adopts a licensing model which is not entirely favourable to American interests, granting too much residual authority to Cabinet risks exposing Cabinet to increased American pressure.<sup>14</sup>

#### **THE MANAGEMENT OF DISPUTES: THE U.S. CASE**

Three kinds of problems come to mind: when claimants cannot acquire sufficient information about cable carriage on which to register a claim; when there is disagreement about the allocation of the royalty pool; and when payments are not transmitted with

sufficient regularity or haste. The U.S. Act requires cable systems to provide up-to-date information on carriage, but it is unclear how the American process has sought to cope with those cable systems which do not comply with sufficient speed. Those four-fifths of systems which complied with requirements for providing information also provided royalty payments. Payouts have not yet been made partly because the macro-apportionment is before the courts and partly because the Tribunal has failed to produce a consensus among individual claimants with respect to micro-apportionment.

#### THE MANAGEMENT OF DISPUTES: IMPLICATIONS FOR CANADA

A Canadian licensing scheme is less likely to encounter difficulties in securing accurate information on cable carriage because of the much smaller number of systems. In 1978, some 4,000 systems operated in the United States as compared to 463 in Canada.<sup>15</sup> Nonetheless, a Canadian Act would likely diminish the likelihood of dispute if it required cable systems to report their carriage to the pertinent regulatory authority according to a specific schedule and if royalty generation payments were made to the regulatory authority rather than directly to claimants. If the Canadian licensing scheme authorizes allocations to parties in addition to or other than broadcasters, it would be helpful to small potential claimants if procedures of application were simple and inexpensive. It is important that small claimants not be dissuaded from applying by prohibitive costs of application.

Messrs. Keyes and Brunet recommend that the Copyright Appeal Board be replaced by a Copyright Tribunal with considerable responsibility outside the domain of rediffusion licensing. We have no comment to make on the various Keyes-Brunet recommendations to create new rights or to increase regulatory authority in the field of copyright. In the particular instance of rediffusion, whether the regulatory authority is called an Appeal Board or a Tribunal, it will need to assume additional responsibilities if a scheme of compulsory licensing is enacted. Some Canadian traditionalists will be saddened at the prospect of changing the name of the regulatory authority. Canadian cultural identity is normally helped most by the retention of

distinctively indigenous terms. When the Appeal Board was created in 1936, it was an innovation of some importance, which the United Kingdom subsequently emulated.

#### **COPYRIGHT AUTHORITY AND COMMUNICATIONS AUTHORITY**

The fact that rediffusion licensing straddles two policy sectors, communications and copyright, does pose a problem of coordination and compatibility. The problem of compatibility between authorities responsible for copyright and those responsible for broadcasting or communication may affect the initial design of a licensing scheme as well as subsequent implementation. As a result of the training, expertise, and responsibilities of their staff, copyright authorities are unlikely to evaluate rediffusion licensing primarily in terms of broadcasting or cultural objectives. Their assessment of rediffusion licensing models is more likely to be based on whether fair compensation is provided to broadcasters and/or copyright owners than on what impact the distribution of royalties would have on broadcasting performance.

Whether communications authorities or copyright authorities should be pre-eminent in the design of rediffusion licensing should depend on the relative importance of compensation as opposed to broadcasting performance among the priorities of the Government of Canada. The principle of compensation for use of broadcast material is important in the American licensing process, and rightly so, because the U.S. government does not have to be as concerned as the Canadian government about the performance of domestic cultural, broadcasting, and entertainment industries in the face of foreign competition. U.S. cultural activity is so pre-eminent globally that American culture is almost world culture.

However, the government of Canada must aid explicitly the performance of Canadian broadcasting and cultural industries. Broadcasting and program production cannot be treated in the same vein as appliances, textiles, machine tools or other products which are suited to principles of international substitution and global efficiencies of scale. Canada has special needs for indigenous programming on account of her spatially diffused

population and her ethnic, linguistic, and regional differences. Because of her proximity to the American goliath, Canada also has a special need for quality indigenous programming in order to encourage the flowering of collective self-esteem.

These needs, traditionally recognized in broadcasting policy and law, require a pre-eminent role for broadcasting and communications authorities in the development of rediffusion licensing. In addition to a licensing scheme designed to achieve certain broadcasting objectives, a **Copyright Act** should contain explicit criteria rooted in broadcasting policy by which authority to adjust royalty rates is delegated to the Copyright Appeal Board or its successor Tribunal.

### CONCLUSIONS

Enacted in 1976 to take effect in 1978, the United States' compulsory licensing scheme for rediffusion has followed a convoluted path. The provisions for the generation of royalties from cable systems are complex because the formulae imbedded in the American **Copyright Act** are complex. The actual process of allocating royalties to claimants is complex because authority over allocation was delegated to the **Copyright Royalty Tribunal**, whose deliberations on this matter have been confusing and uncertain. The Tribunal did not oblige claimants to demonstrate clearly their ownership of copyright. Nor did the Tribunal use a formal, replicatable procedure for the allocation of royalties. The Tribunal's decision-making style could be characterized as an informal one in which formal rule-making took second place to the implicit values of American culture. In the Tribunal's first major allocation, the lion's share of royalties 75 percent, was apportioned to the Hollywood nexus represented by the Motion Picture Association of America. Although the U.S. **Copyright Act** assigned substantial weight to CBC broadcasts (4:1 ratio) with respect to royalty generation, the CBC may in the end receive a very small royalty allocation.

The first of three major conclusions to be drawn from this chapter is that Canadian legislation should involve simple rather than complex formulae and should contain detailed stipulations in place of substantial delegation. Simple formulae for royalty

generation and allocation will diminish the likelihood of administrative error. A detailed description of these formulae and detailed limitations on the latitude of the copyright regulatory authority will reduce the possibility that the licensing scheme, when administered, will depart greatly from legislative intent.

A second conclusion to be drawn from this chapter is that the Government of Canada should consider exploring fully the extent to which Canadian interests may have suffered under the U.S. Tribunal's administration of rediffusion licensing. If Canadian interests have been harmed and if Parliament is to be asked to enact a licensing scheme which provides direct payments to American interests, it may be desirable for Cabinet to retain authority to make the transmission of royalties to American interests contingent on a satisfactory resolution of royalty allocation matters under the U.S. scheme. If the CBC's expected share of U.S. royalties does not increase from the current estimate of approximately \$60,000, and if research does demonstrate that Canadian interests have been treated inequitably in the U.S. Tribunal's allocations, it would be possible to conclude that the U.S. licensing scheme entails discrimination. On its own, the 4:1 royalty generation ratio is a disincentive for U.S. cable systems to carry the signals of CBC, the leading Canadian claimant.

To be fair, a good argument could be made that the small royalty portion allotted to the CBC reflects the low esteem in which American non-educational broadcasters were held by the Copyright Royalty Tribunal. The National Association of Broadcasters, representing a large number of private American broadcasters, ended up receiving merely 3.25 percent of the total royalty pool. The small allotment to the CBC may not have reflected any conscious or unconscious American cultural values. Nonetheless, Canada is by far the largest national customer of all the cultural products marketed globally by American industries. On this basis, Canada has a well deserved claim to scrupulous treatment. If the federal government ever raises with the U.S. government the matter of CBC's treatment under the American licensing scheme or if the U.S. government ever raises

questions about Canadian copyright policy, it may be appropriate for the Canadian government to broaden discussions to encompass the larger question of the one-way flow in cultural products.

A third conclusion to be drawn from this chapter is that rediffusion licensing straddles two policy sectors, communications and copyright. Because of the importance of broadcasting to Canada, broadcasting and communications authorities should be given a considerable role in advising cabinet on the licensing model to adopt. The new copyright task force, created by the Department of Communications, may help provide such an opportunity.

## NOTES

1. The Copyright Law Revisions were committed to the Committee of the Whole, U.S. House of Representatives on September 3, 1976. For most purposes, the revisions in the form of a new **Act** took effect on January 1, 1978. Useful descriptions and discussions appear in U.S. Congress, Report No. 94-1476 and in Melville B. Nimmer, **A Preliminary View of the Copyright Act of 1976: Analysis and Text** (New York: Metthew Bender, 1977). Provisions for compulsory licensing in rediffusion appear mainly in **17 USC 111** (i.e. section 111 of Title 17 of the U.S. Code), "Limitations on exclusive rights: Secondary transmissions."
2. p. 144. Words in parenthesis added.
3. **Federal Register** 46 (January 5, 1981) 2, p. 897.
4. **Federal Register** 46 (January 5, 1981) 2, p. 897.
5. Conversations with Roger Wagner, President, bi Associates, Washington, D.C. in 1979. A July, 1979 CBC submission to the Tribunal noted that wrong DSE totals had been calculated "in a number of cases," that CBC stations had been wrongly classed as "network" instead of "independent" stations "in some instances," and that about one-fifth (approximately 750) of cable systems had failed to file under the **Act**.
6. Letter from D.E. Lytle, Director of Corporate Services, CBC to the Hon. Douglas Coulter, Chairman, Copyright Royalty Tribunal, p. 2. Emphasis added.

7. See letter from D.E. Lytle, Director Corporate Services, CBC to the Hon. Mary Lou Burg, Chairman, Copyright Royalty Tribunal, 22 May, 1980, p. 2.
8. Corporate Program Services, CBC, **Copyright Royalty Tribunal (Documentation)** (Ottawa: November, 1980).
9. Lytle to Coulter, p. 5.
10. Letter from D.E. Lytle, Director, Corporate Program Services, CBC to the Hon. Mary Lou Burg, Chairman, Copyright Royalty Tribunal, 2 July, 1980, pp. 5-7.
11. **Copyright in Canada**, p. 144.
12. CRTC public announcement, January 22, 1973.
13. In their important study of English-language independent producers in Canada, Hugh Edmunds *et al* make the following observation: "Certain values have been attributed to independent production. They range from philosophical ones concerned with the defense of a free society which is encouraged by many voices having access to the public - voices not filtered through conventional institutions so that by a 'free flow of information' an enlightened citizenry can make the wisest choice from a multitude of alternatives. In a more pragmatic vein it has been claimed that the independent producer will bring forth new and fresh program ideas. Through his originality and efficiency learned from his struggle to survive and prosper, he will develop new methods of reaching audiences at reduced costs - and do so with a product which is more attuned to the needs and interests of the audience. In so doing, he will provide a platform for our otherwise unrecognized or unexploited talents and/or resources. Finally, it is assumed that with a vigorous independent production industry in what is a very labour intensive business, a much greater scope for employment will be offered to Canadian craftsmen, technicians and performing talents. Such a situation would create greater opportunity for all and allow the best to rise more rapidly into public view, gaining international recognition and export dollars for Canadians." Hugh H. Edmunds *et al*, **A Study of the Independent Production Industry** (Windsor: Centre for Canadian Communications Studies, University of Windsor, April, 1976), vol. 1, p. 6.

14. On the role of cabinet in regulation, see Richard J. Schultz, *Federalism and the Regulatory Process* (Ottawa: Federal-Provincial Relations Office, 1978), reprinted as an IRPP publication.
15. According to the *Television Factbook*, issue no. 48, 3997 U.S. systems operated on September 1, 1978. For Canadian data, see Statistics Canada, *Cable Television* (1978), catalogue 56-205.

## CHAPTER 8

# Cable Copyright and other Potential Rights

*by Conrad Winn*

### INTRODUCTION

The possibility of copyright liability for the cable rediffusion of broadcasts is of considerable interest to the broadcasting industry and to those in government who are responsible for communications policy. Yet, the form and substance of a rediffusion right in a new copyright act could have implications for other rights which might be included in the forthcoming copyright act, which might be added at a later date, or which might be included in another new copyright act in a generation or two. In the past sixty years, technological developments in broadcasting, computing, telecommunications and related fields created the need for a panoply of new rights to preserve order in the marketplace and to protect the rights of the creators of new intellectual matter. Canada's existing commitments under the Rome Convention of the Berne Union include no provision for the protection of sound recordings, broadcasts, computer programs, and other matter which either did not exist or were not considered important at the time when the Rome Convention came into force. The pace of technological innovation is unlikely to decelerate in the years to come. Indeed, because of the anticipated pace of technological innovation in the future, the new copyright act is likely to have a shorter life-span than the current one and be subjected to greater pressure for amendment and fundamental revision.

A rediffusion right in the new copyright act should be constructed so as to exclude undesirable principles or characteristics which could inadvertently be turned to as precedents in the consideration of subsequent rights. The purpose of this brief chapter is to identify desirable principles or features which should characterize the rediffusion right and which would also be applicable to other rights which may be enacted in Canadian law.

### SOME PRINCIPLES

#### Priority for Canadian Matter

Where not explicitly prohibited by treaty, a new act should provide favourable protection for Canadian matter. In the particular case of the cablecasting of broadcasts, it is better to provide no rediffusion right at all than to establish a right the effect of which is to direct most copyright revenues to U.S. owners. Depending on the rates of payment established by any particular compulsory licensing scheme, the international balance-of-payments loss need not be huge with respect to any particular matter. But, if all new rights were extended to foreign matter, the accumulated deficit could be substantial. Furthermore, when protection is extended to foreign matter or when protection is structured so that foreign copyright owners are the major beneficiaries, a precedent is established for the structure of payments in successive new rights.

#### Social Objectives

Chapter 4, *Some Economic Issues*, argues at length that societies may, do, and should define property rights in terms of the just and fair claims of affected parties and in terms of the needs of society for certain kinds of economic activity. If the much ballyhooed information age is truly amidst us, the production, distribution and consumption of information is rapidly becoming central not only to the flourishing of modern political systems but also to the development of modern economies. Almost by definition, copyright is a policy instrument of vital importance to governments operating in the information age. To make the most of copyright, governments need to give attention to how copyright can be structured to encourage

the production of the specific information and communications products considered important for the functioning of national economic and political systems.

The fact that copyright is largely concerned with the rights of artistic and other creative personnel does not diminish the ability of government to employ copyright for national policy purposes. In *Copyright in Canada*, Keyes-Brunet observe that "a Copyright Act is concerned primarily with creators" and that "creators' rights [should] be the norm in a revision of copyright legislation." (p. iii). However, the principle that creators' rights are central does not by itself delimit in a precise way what these rights should be and who should receive them. For example, Keyes-Brunet do not propose a right for American broadcasters whose broadcasts are rediffused in Canada. Nor do they propose a right for writers, composers and other creators whose copyright work is rediffused in Canada or abroad. Keyes-Brunet propose a right for Canadian broadcasters only and only for the rediffusion "of their Canadian broadcasts." Hence, the commitment of Keyes-Brunet to the primacy of creators' rights does not lead inexorably to enacting equal rights for all creators irrespective of functional role or of nationality.

The Keyes-Brunet proposal to grant a rediffusion right to Canadian broadcasters illustrates the potential flexibility of copyright law and its ability to achieve objectives for society which are broader in nature than merely protecting the rights of creators. According to the well known convention/non-convention distinction credited to Keyes-Brunet, the flexibility of Canadian governments is greatest in the case of modern technologies for which Canada has not incurred international copyright obligations. One of the best known examples of flexibility in copyright law is the "manufacturing clause" originating in the U.S. *Chase Act* of 1891. The "manufacturing clause" was permissible because the United States had not acquired the obligations of membership in the Berne Copyright Union. The U.S. Congress is expected to let the clause die in 1982, partly because of some desire by some U.S. officials for their country to join the Berne Union. The clause itself has required certain works to be printed in the United States in order to receive protection from the Act. The industrial effect of the clause was to provide a strong continuing boost to U.S. printing concerns.

To return to the matter of a rediffusion right for Canada, the federal government could single out certain kinds of creators for special protection. Which categories of creators receive the greatest protection ought to depend on the social objectives of government rather than merely on abstract principles of copyright law. This principle of social objectives should be encompassed in a rediffusion right and in other new rights.

#### Substantial Benefits

Because the enactment of new laws and the creation of judicial or quasi-judicial tasks and institutions are costly, they should only be undertaken when the recipients of copyright protection do receive significant financial or non-financial benefits. In the particular case at issue, the introduction of a right to rediffuse would make sense if broadcasters and/or program copyright owners received substantial benefits in the form of meaningful rediffusion right payments and/or in the form of non-simultaneous program substitution.

#### Allocative Simplicity

All legislation, copyright law included, receives its greatest public credence and legitimacy when it is simple rather than complex. In legislation prescribing the allocation of resources, simplicity reduces the likelihood of complex, costly, protracted, and disheartening dispute among claimants. The provision of a rediffusion right should identify clearly the contributors and recipients of copyright payments and should, where possible, provide simple formulas on which payments are to be calculated. The categories or classes of contributors and recipients should be kept small in number.

#### Allocative Validity

As a corollary, the formulas used to collect and allocate copyright payments should entail the use of reliable and valid data bases. Generally, survey or marketing research-type data are less reliable than accounting data. For example, if it were thought necessary to vary copyright payments made by cable companies according to their market sizes, it would be easier to

establish with certainty the number of subscribers served by a cable company than the number of viewers of a given channel on cable. Establishing the number of viewers by channel requires survey or market research. However, it is neither cost-effective nor in the economic interest of survey or market firms to achieve the high response rates in surveys necessary to establish market behaviour with great certainty. Furthermore, small markets are not often treated to survey analysis.

Survey or market data may be theoretically more appropriate as an indicator of the benefits received by a cable company as a result of carrying a given broadcaster's signal and therefore as an indicator of the copyright payments the cable company should make. But, the number of subscribers served by a cable company or other accounting-type data should be used instead because accounting data are less subject to interpretation and dispute.

#### Administrative and Adjudicative Simplicity

As a further corollary, any provision for the administration of payments, for changing the level of payments to take into account inflation, or for the resolution of disputes over payment should be simple. Normally, new regulatory bodies should not be created. Instead, new tasks should be assigned to existing bodies.

#### Foreign Policy Consistency

In Canada's bilateral relations with the United States, it is important to distinguish a dispute where the U.S. government strongly asserts a view which flows from American national interest from a dispute where the U.S. government strongly asserts a view as a result of the influence exerted by a dynamic American interest group. Where a fundamental American interest is at stake, for example with respect to energy or water, Canadian policy need not be consistent but can instead reflect the specific importance Canada attaches to every item under negotiation. Where fundamental American interests are involved, bargaining between the two countries is likely to have a pragmatic **quid pro quo** flavour. The United States wishes to achieve certain objectives while being prepared to concede others.

However, where the U.S. government strongly asserts a view as a result of pressure group influence, U.S. bargaining behaviour will reflect not just a concern to achieve certain objectives, but it will also reflect a concern to placate the domestic interest group. In such circumstances, a vacillating, inconsistent, or nonassertive Canadian stance may be interpreted as evidence that Canada is highly amenable to American pressure. Indeed, the domestic American pressure group may be motivated to increase its demands that the U.S. raise the stakes in bilateral negotiations. Where the Canadian government fails to follow a consistent and strong path, the U.S. government may find it difficult to explain to its domestic interest groups that Canada is firm and cannot be moved by the threat or exercise of American power. On the contrary, a bargaining loss for the United States is likely to be seen as a failure of skill or of nerve rather than as evidence of Canadian commitment.

Generally, copyright and other broadcasting and cultural matters are not of absolutely vital importance to the United States, but they are of great interest to dynamic interest groups such as border broadcasters. When small countries negotiate with large countries, they often find it effective to adopt a posture of gradually increasing assertiveness. If the assertiveness of the weak country is sufficiently strong, the large country is obliged to calculate rationally whether any given item in dispute is really of vital national interest.

Where a genuinely vital U.S. national interest is involved, a small country negotiating with the United States may adopt a flexible stance, including compromise, vacillation, and/or retreat. However, in the case of copyright, culture, and other issues which are salient but not necessarily vital to the United States, vacillation or compromise may invite interested American groups to redouble their pressure on their government.

#### CONCLUSION

This chapter began by suggesting that the anticipated pace of technological change may create demands for new kinds of rights in the future. If indeed technological complexity and copyright complexity are linked, it would be a reasonable guess that the

forthcoming copyright act will be revised in less than the 60 years' time it has taken to revise the current Act. At a minimum, rapid technological change will require a number of amendments in the years to come.

The fact that copyright law is an ongoing process means that care should be taken with respect to the principles and practices embodied in new rights. Seven principles governing copyright policy and bilateral Canada-U.S. cultural relations were suggested. (a) Where not prohibited by treaty obligations, the benefits of copyright protection should be directed mainly or solely to Canadian matter. (b) Benefits should be determined not only in terms of the just claims of interested parties but in terms of the needs of society for incentives to produce certain kinds of information or communications products. (c) Rights should only be introduced if they entail meaningful financial and/or nonfinancial benefits. (d) The contributors and recipients of copyright benefits should be identified clearly and allocative formulas in compulsory licensing should be clearly and simply stated. (e) Allocative formulas should require the use of relatively incontestable data bases such as accounting data rather than survey or market research data. (f) Administrative and adjudicative mechanisms should be simple and should be assigned to existing rather than new regulatory bodies. (g) For reasons which are explored in the text, it may be effective for Canada to adopt a strong and unwavering policy with respect to the enhancement of its culture by means of copyright and other instruments. Inconsistency or vascillation entails a risk of motivating domestic American interests such as border broadcasters to redouble their efforts to get the U.S. government to raise the stakes in bilateral negotiations on culture.

## CHAPTER 9

# Alternatives to Copyright

*by Conrad Winn*

### INTRODUCTION

Whenever a government must consider introducing major new legislation, it needs to explore the strengths and weaknesses of alternative instruments for achieving the same objectives. Governments may possess many alternative means of seeking to achieve any given policy objective. Copyright is not the only instrument available to government for improving the economic position of creators. Income tax policy, grants-in-aid, low interest loans, regulation, corporate tax policy, usage and import quotas, tariffs, purchasing policies and other instruments can all be structured so as to reduce the operating costs of creators, reduce their competition and increase their markets, or increase their pre- and/or post-tax revenues.

A system of excise taxes could be modelled imperfectly on compulsory licensing in copyright. Thus, excise tax revenue could be generated from cable systems and allocated to creators in a fashion similar but not identical to the Keyes-Brunet or Economic Council proposals. An excise tax system and a copyright royalty allocation system could be very similar with respect to allocation. For example, funds from an excise tax pool could be

allocated to Canadian broadcasters only (Keyes-Brunet) or to noncommercial broadcasters (Economic Council). However, an excise tax system could not generate payments from the normal revenue of cable systems, as is the case with copyright royalties, but would be imposed on top of normal revenue.

Economic protectionism is a frequent motive for countries to establish "rights" in administrative law or legislation outside a copyright act. Iceland, Norway, Sweden, Finland, Denmark, New Zealand, and Australia all established public lending rights outside copyright law. In Denmark and New Zealand, royalties are paid to nationals on the basis of the number of their books held by certain libraries. In Sweden, royalties to native authors are paid partly on the basis of the volume of actual library loans.<sup>1</sup> Article (4) 1 of the Rome Text of the Berne Convention for the Protection of Literary and Artistic Works requires that nationals of Berne countries receive those rights in Convention works which the domestic legislation of any Berne country "may hereafter grant to natives." Since literary works are protected by the Convention, Convention countries would be obliged to provide protection for authors from all Berne countries if a public lending right were encompassed in copyright law.

Establishing a public lending right outside copyright law might be viewed as a sleight of hand which transgresses the spirit of the Berne Union and of the closely related Universal Copyright Convention. Some Berne member countries may conceivably make an issue of this practice at some future date. However, in substance the provision of a public lending right outside copyright law is not too different from many of the less visible but no less effective ways in which GATT countries have bypassed GATT strictures against discriminating in favour of domestic industries.

In the particular case of broadcasts, it is not necessary for legal reasons to establish a rediffusion right outside copyright law in order to limit the benefits of protection to Canadian broadcasts. As Keyes-Brunet have shown, broadcasts are not protected by the conventions to which Canada has acceded so that Canada could protect Canadian rather than all broadcasts if this were desirable. The United States government and American

broadcasting and copyright interests would not have a strong basis in copyright law for opposing a protectionist Canadian rediffusion right.<sup>2</sup>

However, international law may be a less important motivating factor than attitudes and expectations grounded in the fact that the American rediffusion licensing scheme offers some protection to some copyright material in Canadian broadcasts. Furthermore, this protection may be viewed as equitable or even generous. The current implementation of the American licensing scheme accords a certain salience to rediffusion licensing with the result that any attempt by Canada to provide rights for Canadian broadcasts outside copyright law is not likely to go unnoticed. In several sectors of a national economy other than broadcasting, governments can resort to obscure or low-key policy instruments in order to diminish the likelihood of foreign reaction to protectionist actions. But, in broadcasting almost all policy instruments are salient. The large financial interest of American border broadcasters in their Canadian markets requires them to be sensitive to the slightest shifts in Canadian government policy.

In principle, the federal government could implement a kind of Keyes-Brunet scheme by means of an excise tax on cable systems, the proceeds of which would be distributed to Canadian broadcasters. In practice, adopting an ostensibly low-key instrument such as the excise tax instead of copyright may invite even stronger protest from border broadcasters by suggesting a mentality of fearfulness.

The likelihood of a strong American reaction to a Keyes-Brunet-type proposal could have been reduced had Canada adopted a compulsory licensing scheme for rediffusion before the United States did. Had a Canadian scheme been introduced first, the American government and the American entertainment industry would not have had expectations for favourable treatment which they must now have as a result of the ostensibly equitable treatment given Canadian signals under the new U.S. Copyright Act.<sup>3</sup>

If it is a priority of the government to minimize U.S. government pressure to accommodate the interests of U.S. border

broadcasters and the American entertainment industry, then the general posture and strategy to adopt is one of firm, consistent, unwavering, and slowly increasing assertiveness. As suggested in chapter 6, inconsistency or weak assertiveness in the face of American pressure may invite greater pressure.

To conclude to this point, one of the primary motivations for countries to provide rights outside copyright law is to bypass their legal obligations to grant equal protection to Berne nationals under the Berne Convention. But, this tactic has limited merit in the case under examination because Canada anyhow has legal freedom to limit a rediffusion to Canadian broadcasts (Keyes-Brunet). Furthermore, broadcasting is too salient a subject area for it to matter greatly whether ostensibly low-key instruments such as the excise tax are used in place of high profile copyright law.

The remainder of this chapter will consider the comparative merit of copyright, particularly in the shape of a compulsory or statutory license, from the perspective of the following issues: intrinsic characteristics of copyright; exclusive rights to programs; payments by users; compensation to creators; encouraging certain kinds of creativity; and whether alternatives to copyright should properly be viewed as substitutes or supplements.

#### **INTRINSIC CHARACTERISTICS OF COPYRIGHT**

Copyright law has at least two intrinsic characteristics that tend to distinguish it from other instruments of policy: (a) copyright is the customary instrument for generating payments from users and for allocating these payments or royalties to creators, and (b) copyright laws are normally revised or replaced less frequently than many other instruments.

In the advanced industrial democracies, copyright law is the customary method of generating payments from users of creative works and of allocating these payments or royalties to creators. The continuing existence of parliamentary democracy is materially helped when the activities and functions of government are easily understood by major participants in the political process as well

as, if possible, the mass public. When the activities of government are understood and perceived to be meaningful, they are more likely to be looked upon as effective and legitimate. For these reasons, protecting the economic interests of broadcasters and/or copyright owners in their rediffused programs should be assigned to copyright law rather than to some other instrument unless strong empirical evidence suggests that Canada would reap significant benefits from the use of an instrument other than copyright.

In addition to being the customary instrument for the generation and allocation of royalties, copyright is also distinguished by the fact that it is normally revised infrequently. Hence, if a copyright act is designed well, copyright becomes a relatively cost-effective instrument, entailing fewer decision-making costs than other more frequently revised instruments. The current Act will have probably lasted at least three generations before it is replaced. The long duration of copyright law provides interested parties with considerable stability in planning. They know what their financial losses and gains will be over an extended period. This is an important advantage to firms, which often do not like to make investment decisions on the basis of, say, tax policy, which could change with changing governments. A related advantage deriving from the duration and persistence of copyright law may be that interested parties can be discouraged from seeking change motivated by trivial considerations. Governments may be less subject to pressure for change, particularly from foreign governments, than would be the case for schemes established under regulatory authority or administrative law.

#### PROGRAM EXCLUSIVITY

We were asked to consider "the potential of copyright law to resolve the apparent problem between cable rediffusion of U.S. TV signals and the protection of exclusive broadcast rights purchased by Canadian stations." Though Canadian broadcasters ostensibly purchase the exclusive legal rights to diffuse in Canada certain programs created in the United States, they are unable to exercise their exclusive rights as a result of the secondary transmission into Canada of the same programs when

broadcast on U.S. border stations carried by Canadian cable systems. Whether or not any action should be taken to strengthen operationally the normally exclusive rights purchased by Canadian broadcasters is left to the concluding chapter of this report. But, if any Canadian government action should be taken, it is worth contemplating whether the best instrument is copyright law or, say, CRTC regulation.

Current CRTC policy authorizes simultaneous program substitution. Under this practice, whenever a U.S. signal and a Canadian signal rediffused on a cable system carry the same U.S. origin program at the same time, the cable system is authorized to substitute the Canadian version including advertising on the American channel. In principle, the CRTC policy of simultaneous program substitution could be extended to include non-simultaneous substitution or deletion. Substitution could take place when the program is broadcast first by the Canadian station while deletion could take effect when the program is broadcast first by the American station.

However, copyright law would be a more appropriate instrument than CRTC regulation because program deletion and/or substitution entail the protection of formal legal rights to the fruits of creativity, which are ancient in their origin.<sup>4</sup> Copyright would be especially desirable from the perspective of Canada-U.S. relations because the protection of copyright is a principle of commerce which the American government could be invited to appreciate. The Government of Canada might even consider the possibility of extending provisions for program substitution or deletion to broadcasts rediffused across regions within Canada. If copyright law recognized the existence of regional broadcast rights in programs and if these regional broadcast rights were protected by a provision to authorize the substitution or deletion of programs rediffused across Canadian regions, the deletion or substitution of American broadcasts might not be viewed by the United States government as mainly protectionist or nationalist in intent. From the perspective of American perceptions of Canadian actions, the use of CRTC regulation to achieve program substitution/deletion is not highly desirable because the CRTC is viewed as more concerned to enhance Canadian program content than to protect legal rights.

### PAYMENTS BY USERS

As suggested at the outset of this chapter, copyright is not the only possible mechanism for extracting payments from cable systems. In principle, cable systems could be required to pay special rates of income tax. A special excise tax could be imposed. However, neither special income tax rates nor special excise taxes would reflect fully the motivating purpose behind considering a licensing scheme, namely to uphold in broadcast rediffusion the general principle that users pay for the opportunity to use material created by others. Copyright law does reflect this general principle.

### COMPENSATION TO CREATORS

Much the same argument can be applied to the question of compensation as to the issue of requiring payment for use. Creators -- broadcasters and/or the owners of specific rights in programs -- could be compensated for the rediffusion of their programs by means of the revenue from an excise tax pool created from contributions by cable systems, by grants from the federal government or its agencies, by corporate income tax provisions, or by other means. A system of grants would not be a close analogue of copyright law because the allocation of grants entails an element of administrative discretion. An excise tax distribution scheme could be designed so as to be structurally similar to virtually any compulsory licensing scheme under copyright law. However, by its nature, copyright reflects best the principle of obligation which is one of the motivations for considering a rediffusion licensing scheme.

By its nature, copyright also reflects well the principle that the consumption of certain collectively valued goods and services should be encouraged. Because copyright law provides rewards to producers for certain specific patterns of consumption by the public, it may have different cultural consequences from those of other instruments of government. For example, grants and subsidies may stimulate the production of cultural goods and may reward competent applicants for assistance. But, grants and subsidies do not normally reward producers according to how widely their cultural goods have been consumed.

Encouraging consumption is vital to cultural and broadcasting policy for two reasons. First, Canadian creators contribute to Canadian culture and identity to the extent that their work is exposed to the Canadian public. This is not to suggest that artists who are appreciated by elite segments are less valuable than artists who appeal to the mass public. But, highbrow artists or creators who are admired by large portions of elite segments do more for Canadian culture than those who are unknown while popular artists contribute more to identity if they are indeed popular than if they are not. Secondly, artists, creators, and entrepreneurs who have demonstrated some success in Canadian markets are more likely to achieve substantial success in Canadian and international markets than artists, creators, and entrepreneurs who provide no evidence of previous marketability. Copyright is more effective and efficient than government subsidies and other devices as a means of channelling capital to artists, creators, and entrepreneurs who have achieved success and are likely to repeat it. Because of the high cost of technology, distribution, and marketing in the modern cultural industries, increased capital is a vital, albeit insufficient, condition for the flowering of Canadian culture.

#### ENCOURAGING CERTAIN KINDS OF CREATIVITY

Whether copyright is the best instrument for encouraging financially the production of certain kinds of programming depends to some extent on the type of programming to be encouraged. Two types concern us: Canadian programming, and independently produced programming irrespective of whether it is Canadian.

From the perspective of foreign policy, copyright might have been an effective instrument for encouraging Canadian programming along the lines of the Keyes-Brunet proposal if new Canadian legislation had been adopted before the U.S. **Copyright Act** of 1976. However, as suggested earlier in this report, the United States may well expect its own broadcasts to be protected under compulsory licensing in Canada because Canadian broadcasts are now protected under U.S. law. If the Government of Canada wishes to exclude completely the possibility of royalties being paid to owners of rights in American broadcasts, it might be wise to opt for an instrument other than copyright.

Copyright can be an effective instrument for rewarding and therefore for encouraging independent producers of television programming. Independent producers could be granted higher rates of royalty allocation per broadcast-hour than broadcasters under a scheme of compulsory licensing. The concluding chapter of this report considers the possibility of adopting the proposal made by the Economic Council of Canada in 1971 to protect non-commercial broadcasts. The concluding chapter considers the possibility of amending the Economic Council's proposal so as to authorize royalty payments to the independent producers of programs carried by non-commercial broadcasters in addition to and aside from the payments made to these broadcasters.

Because of the large proportion of non-commercial broadcasts which are Canadian and because this proportion will grow as the CBC discontinues advertising, the Economic Council's proposal would not entail an enormous external drain in royalties. Furthermore, the payment of royalties to independent producers of programs broadcast by American non-commercial stations (PBS) could be restricted to only those programs made by independent U.S. producers. The non-American independent producers of programs broadcast by PBS could be subsequently encompassed as a result of bilateral agreements between Canada and various other countries. Furthermore, insofar as PBS stations purchase many of their programs from foreign production houses closely linked to foreign broadcasters, the Government of Canada could consider defining independent producers in terms of independence from any broadcaster and not just from the specific broadcaster diffusing the program.

If Parliament adopts the Economic Council's proposal in the form described in our concluding chapter, some specific thought might be given to achieving a bilateral agreement with Great Britain. Because of the volume of British productions shown by non-commercial American and Canadian stations, independent British producers could stand to gain meaningful royalties. A bilateral agreement with Britain would necessarily require that Canadian broadcasts receive some form of copyright protection in Britain. It would also be desirable for such an agreement to relieve the stringent impediment to the use of Canadian programs on British television as a result of Britain's broadcast quota.

### SUBSTITUTES OR SUPPLEMENTS

To this point in the chapter, excise taxes, government grants, and other instruments of policy have been treated as if they were potential substitutes for a rediffusion right in copyright law. However, the very idea of substitutionability or inter-changeability rests on two questionable assumptions: first, that policy instruments produce easily known and predicted outcomes; and secondly, that Canada's cultural and broadcasting objectives can be achieved by the use of one instrument -- or at least a very few -- rather than by many.

A noteworthy example of the need to employ many instruments to achieve an important policy objective is the federal government's quest to improve the socio-economic conditions of lower income people. This redistributive objective has entailed the use of income taxation, federal-provincial grants for health care, family allowances, support for public transportation, and so forth. Certain objectives of government require the use of many different instruments because of the significance and size of the objective and because given instruments do not always produce anticipated outcomes. For example, when family allowances were first introduced, they were justified by their proponents as support for lower income families while they were condemned by critics as undeserved support to the indolent and profligate. Yet, until family allowances were encompassed by income taxation many years later, family allowances were not redistributive in their effect. As tax-free income, they were worth more to the rich than to the poor.

Redistributive policy is vital to the integrity of any political system because of its role in keeping together people from different income strata. Likewise, cultural and communications policy are vital for Canada as a means of keeping together people belonging to different regions, ethnic and language groups in the country. A good case can therefore be made that the Government of Canada should resort to many rather than few of the instruments reviewed in this chapter.

## CONCLUSIONS

The central thesis of this chapter is that copyright law is not the only instrument which can be used to protect exclusive program rights, to compensate the owners of broadcast programs, or to achieve certain other related objectives. However, when copyright law is compared to excise taxes, CRTC regulation and other instruments, singly or in combination, copyright emerges as the most appropriate instrument.

The main reason for many countries to resort to analogues of copyright rather than to copyright itself is to avoid extending certain rights and benefits to non-nationals. The Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention assure certain common rights to the citizens of all member countries with respect to certain works. Almost all those countries which provide a public lending right do so outside the framework of copyright law with the result that royalties need only be paid to nationals. However, as Keyes-Brunet have shown, broadcasts are not protected by the Conventions to which Canada has acceded so that Canada is legally free, even within copyright law, to protect only Canadian broadcasts. Furthermore, broadcasting is too salient a subject matter for it to matter greatly for Canada-U.S. relations whether Parliament sought to favour Canadian broadcasts by using a low-key instrument such as excise taxes or high profile copyright law.

For each of several specific policy objectives considered in this chapter, copyright emerged as the most suitable instrument. For example, payments could be allocated to the owners of rights in programs from a revenue pool created from an excise tax on cable systems in a manner analogous to that of a compulsory licensing scheme in copyright. However, excise taxes would not generate income from cable system revenue so that an excise tax scheme would reflect less well than a copyright scheme the principle that users should pay.

To offer another example, CRTC regulation could continue to be the main instrument for protecting the interests of those who own the Canadian rights to programs created in the United

Stated simply, the fundamental relationship is: television stations are the suppliers, and cable television systems are the users.

Thus, the basic principle involved is: one should pay for what he uses to operate his business. Even if there were no damage or if the cable television systems increased profits to the television stations, this principle would still be true. For example, the popularity of musical selections will be enhanced by exposure on radio stations - but not only are the stations not paid for this exposure, they must pay for the use. The task of the Commission must be related to the fundamental philosophical idea of payment for services rendered and for use made, with the pragmatic realization that, without this payment, in the long run, the very stations on which the cable systems depend may no longer be able to provide them those many services ....

The Commission believes that it is imperative that the broadcasters and the cable television operators develop a method which will correct this inequality that has developed in the system. However, if no solution is forthcoming, the Commission will take the necessary steps to achieve this goal.<sup>40</sup>

The CRTC also suggested a plan for compensation by cable systems to broadcasters whereby the amount of compensation would be based on cable revenues, with a higher percentage imposed upon cable companies with higher revenues. In return, cable companies could receive authorization to replay programs already broadcast with advertisements intact. Cable companies could also use some of these predetermined funds to purchase program rights from other sources, such as the National Film Board.

hand, it is useful to quote from the policy statement at some length:

Cable television systems now rely for their existence upon the services supplied by television stations, and the Commission therefore has come to the conclusion that some method must be derived for cable television to make financial recognition of this fact.

Cable television is a rapidly growing and generally thriving industry. As a result, some argue that cable television should pay the television broadcasters a subsidy and not try to develop a reason as to the "why" other than the "need". Others say that since cable television systems damage television stations, cable television systems should pay for this damage. However, the Commission believes that there is a more fundamental consideration.

While cable television helps the television stations by improving picture quality and extending service areas, television stations do not depend on cable television for survival. However, the cable television systems are completely dependent on the television stations whose services they use in order to develop a value for subscribers who connect to their systems - television is literally the *raison d'être* of cable television. In effect, while cable television operators may argue they are really only selling an antenna service, sophisticated as it is, the subscribers are buying not antennas, but programmes.

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## CHAPTER 10

# Conclusions and Recommendations

*by Robert E. Babe and Conrad Winn*

### CONCLUSIONS

This study was commissioned by the Department of Communications to assess, from the point of view of Canadian communications policy, the pros and cons of the Keyes-Brunet proposals for institution of a rediffusion right in Canadian broadcasts of Canadian program material, and to suggest alternative policies. In the process of undertaking these responsibilities, the consultants have also had to come to grips with the question of whether copyright *per se* is a suitable and appropriate tool through which to pursue communications policy, the specific recommendations of Keyes and Brunet aside.

Copyright, by structuring the right to reproduce or perform individual creations, constitutes both a means of securing reward to creators for previous production and also an inducement to further creative activity. All forms of economic activity, of course, are undertaken only within a system of legal rights to property; in these respects copyright is no different from other aspects of property law.

By Canadian communications policy, we understand in part that certain types of cultural activity, namely Canadian cultural creations, are to receive greater stimulation, reward and

exposure than is at present the case. Insofar as the system of copyright helps structure markets and incentives for all cultural creations, it is apparent that copyright is certainly a suitable mechanism whereby communications goals can be pursued.

Copyright law can be employed to determine not only how much cable systems must pay for the opportunity to rediffuse broadcasts but also how these royalties should be apportioned among contending interests. Indeed, it is vital for Canadian broadcasting and cultural policy to consider to which group or groups and in what proportion royalties should be distributed. The apportionment of this income will help determine what types of television productions, and in what quantities, will be undertaken in Canada in the future.

As was developed at length in Chapter 3, the present system of property in Canadian broadcasting (which includes copyright law) induces inadequate performance in light of the magnitude of the financial resources at the disposal of the industries concerned. Both the private sector of Canadian television broadcasting and the cable television industry are enormously profitable, but the private sector of the Canadian program production industry remains highly underdeveloped. The entities in Canada that have contributed substantively to the Canadian content obligations articulated in the **Broadcasting Act** are to be found in the public sector, but if given the opportunity, it is conceivable that independent producers too would contribute.

Under the current system of property, it is permissible for cable television companies to distribute, without compensation to copyright holders, programs being aired simultaneously by over-the-air broadcasters and to collect a fee from subscribing households for so doing. Furthermore, cable companies are free to erode the market exclusivity of program rights purchased by local stations through their importation of distant signals, except in those instances where local and distant stations are simultaneously diffusing identical programming; this latter restriction is attributable to CRTC regulation, however, not copyright law. Cable companies are not authorized to videotape for subsequent rediffusion or otherwise television programming in the absence of contracting with the rights' holder. Regulatory

policy (as opposed to copyright legislation) prohibits cable companies from stripping the commercial content from broadcasts and substituting their own commercial messages. However, it appears that current copyright law (in the absence of regulatory prohibition) does not preclude such commercial deletion and substitution.

For a number of reasons - lack of copyright liability, monopoly status, absence of profit regulation, as well as public popularity - cable operations are highly profitable. We estimate pre-tax earnings accruing to the industry over and above the cost of attracting new investment funds to have been \$20 million in 1977 and \$29 million in 1978. As new services are added, as penetration increases, and as more rate increases are approved, cable industry profitability could well increase substantially over the long-term.

With regard to private television broadcasting it was noted that market forces, as given by the current system of property, do not work towards the fulfillment of the objects contained in the **Broadcasting Act**. Irrespective of whether one looks at diversity in program offerings, scheduling practices, employment, audience statistics, or program procurement practices, the conclusion stands out that public broadcasting remains the most effective way of pursuing the Canadian content goals set for broadcasting.

Due to market foreclosure, Canada is largely deprived of accessing the creative talents of independent production companies. In the absence of fundamental industry restructuring, it is unlikely that the private sector of Canadian television broadcasting can be induced to remedy this deficiency. Again, the most promising solution lies in procurement of independent productions by the CBC and provincial broadcasting undertakings. (As a matter of principle, however, the authors would welcome independent productions on CTV and other private sector undertakings).

We noted in some detail two major proposals to invoke cable copyright liability for broadcast rediffusion. Keyes-Brunet recommended invocation of a "rediffusion right" whereby copyright

protection would be provided "by means of a right to rediffuse, to Canadian broadcasts incorporating Canadian program material". The Economic Council of Canada recommended that cable copyright liability be invoked in instances where non-commercial programming is rediffused, and where commercial deletion and substitution is carried out in the case of commercial programming. Neither the Keyes-Brunet nor the Economic Council recommendations addressed the issue of exclusivity of program rights in the face of cable importation of distant signals, an issue which was a major concern of the Clyne Committee.

A distinguishing feature of the Keyes-Brunet position is that copyright payments for rediffusion would not be made to U.S. interests. Restricting the outflow of royalties may be desirable from the perspective of a narrow, short-term notion of Canadian self-interest. Depriving the U.S. cultural sector of revenue from rediffusion in Canada may have a certain practical justification because Canada is already a large supplier of royalties to the United States and because not all of these royalty transfers result from the free and unhindered flow of cultural goods across the border. The longstanding "manufacturing clause" in U.S. copyright law is one of the better known examples of efforts to impede the free flow of cultural trade in order to give advantage to American enterprises. However, an analysis of the issue which is rooted in ethics and morality might conclude that Canada ought nonetheless to recognize in law U.S. copyright interest.

The prime reason cable companies have been so successful financially is the rediffusion of American television signals, and this fact gives moral justification to the argument that compensation should be paid. Furthermore, although Keyes and Brunet are correct to note that Canada's international copyright treaty obligations do not specifically encompass broadcasting, non-discrimination as to country or origin is a predominant feature of international copyright treaties. Canadian foreign policy has traditionally concerned itself with the development of order and fairplay in the international community. Given these complexities and differences in perspective, different positions could be taken with respect to whether it is moral or in Canada's

true interest to exclude American enterprises in whole or in part from the benefits provided by a rediffusion right in Canadian law.

Apart from moral questions and international principles, one may further ask if the Keyes-Brunet proposal is the most efficacious method for making the most of Canada's special relationship with the United States. The United States now has in place a copyright system which in principle treats copyright material in rediffused Canadian broadcasts in much the same manner as equivalent American material. Two years after the publication of *Copyright in Canada*, the Canadian Broadcasting Corporation became a claimant under the U.S. system. Although CBC Radio has been assigned no royalties and although CBC Television's anticipated royalties are a small portion of what it had reason to expect, the Corporation does nonetheless anticipate receiving some royalties. To the untrained eye, the American law may look eminently reasonable and fair while the Keyes-Brunet proposal, in its simplicity, may seem discriminatory. Chapter 7, above, on **Administrative and Regulatory Issues**, suggested that the administrative details of the American copyright system discriminated strongly against Canadian interests, but administrative details are often overlooked or are poorly understood. If the Keyes-Brunet proposal were enacted, the **in principle** discrimination of Canadian law might become a contentious bilateral issue rather than the **in practice** discrimination of U.S. law. In international diplomacy as in other aspects of life, a good offence is often worth substantially more than a good defence.

The Economic Council's proposal for payments with respect to all rediffused non-commercial broadcasts does not entail discrimination against U.S. interests. The Economic Council's proposal therefore does not affront moral axioms or foreign policy concerns to avoid discrimination by nationality. In practice, U.S. Public Broadcasting System stations whose programs are rediffused in Canada would receive royalties. Because PBS stations are a small minority of all stations whose programs are rediffused in Canada, particularly if local rediffusion is included, the royalties leaving the country would be a small share of all those paid by Canadian cable companies.

In our view, the Economic Council proposal is advantageous insofar as it is non-discriminatory, it is relatively unprovocative in foreign relations, and most rediffusion royalties would remain in Canada. Nonetheless, there is an even more fundamental question to consider, namely the objectives of Canadian communications policy.

Keyes-Brunet propose that copyright payments be made to broadcasters, both commercial and non-commercial. For any given program broadcast on television and rediffused by cable, there are normally many different owners of copyright material. The American rediffusion experience suggests that uncertainty, conflict, and litigation may increase substantially as a result of an increase in the number and types of claimants authorized in copyright legislation. The Keyes-Brunet proposal to grant a rediffusion right only to broadcasters is not unreasonable.

However, the idea of requiring that payments be made to commercial as well as to non-commercial broadcasters may be ineffective from the point of view of Canadian communications policy. Payments to commercial broadcasters will induce more and better Canadian programming only to the extent that such funds are actually devoted to program production. It would be difficult to ensure that such funds were used for this purpose unless a fundamental restructuring of private television broadcasting took place. In Chapter 3, *Property Rights in Broadcasting*, we noted the continuing co-existence of supranormal profits in private Canadian television broadcasting and underdevelopment in private sector program production.

The Economic Council of Canada's distinction between commercial and non-commercial television is useful because it reflects the realities of different patterns of behaviour in public and private television as they operate under the present system of property. Public broadcasting has fulfilled much more adequately the Canadian content objectives of the *Broadcasting Act* than has private broadcasting. There exists no convincing evidence that this pattern of performance will change.

Copyright payments to public broadcasters are likely to be devoted to programming. These additional revenues are unlikely to be siphoned off into diversifications, dividends or inflated

prices for acquisition of broadcasting undertakings, which could be the case if these payments were made to private broadcasters. Furthermore, the federal government's goal of encouraging independent program production is more likely to be met by directing funds to and through public broadcasting as opposed to commercial broadcasting. As a practical matter we see little to be gained from a simple transfer of funds from one profitable industry to another in the absence of a significant likelihood of improved programming performance. This is a principal weakness of the Keyes-Brunet recommendations.

At this point, we turn from the question of the financial benefits which a rediffusion right may provide and address the issue of market exclusivity. The threat to the exclusive market rights purchased by broadcasters is multi-faceted. A traditional problem is that exclusive market rights, duly purchased by conventional broadcasters, have frequently been violated by the importation of programs by cable. Technological development may exacerbate the problem in the years to come.

The conjunction of communication satellite technology with locally franchised cable systems throughout the country makes possible and likely the advent of new, national broadcasting entities originating programming from a single geographic point. Their national coverage will permit such entities to compete for exclusive program rights with existing conventional broadcasting stations and networks. Under current copyright law, conventional terrestrial broadcasters would probably not be precluded from trapping signals from satellites off air via earth stations and rediffusing the programs simultaneously on their own facilities without copyright payment. The free appropriation of satellite signals for broadcast is analogous to cable's free appropriation of broadcast signals for cable rediffusion. The question of copyright protection for the market exclusivity of programming should be understood in this dual context.

If a revised **Copyright Act** grants an exclusive rediffusion right to those who package and distribute programs by satellite, precluding the unauthorized and/or uncompensated rediffusion of satellite signals by terrestrial entities such as broadcasters, the continued existence of some or many land-based networks and

stations may be threatened by the superior coverage available to satellites. On the other hand, if satellite distributors and packagers are not accorded an exclusive rediffusion right, they themselves may become financially non-viable as "unauthorized" use of their material becomes widespread. It would be unjust to grant an exclusive rediffusion right to satellite-distributed program packagers without according a similar right to traditional broadcasters faced with cable importation and rediffusion.

We take the position that exclusive rights should be invoked in future copyright legislation in order to assure the development of an orderly marketplace for both satellite packagers and terrestrial broadcasters. The free appropriation of programming for rediffusion, as permitted under the current Copyright Act, threatens chaos in the years to come.

We are concerned that the viability of many terrestrial broadcasters, especially the small, could be threatened by the licensing of new satellite-distributed program packagers with exclusive program rights. Local media outlets are essential for democracy and cultural life to flourish at the local level. However, we do not consider the continued non-enforcement of exclusive rights to be an appropriate response to this dilemma.

Responsibility for ensuring the persistence of local media outlets lies with regulation and several other instruments of government, but not with copyright law. The CRTC possesses the authority to determine how many program packagers will be allowed access to satellites and under what conditions. It also has authority over the rediffusion of satellite signals by cable. The CRTC will have to weigh the threat to local stations occasioned by satellite networking against the merits of these new services. The potential demise of local broadcasting can also be considered in the context of the continuing decline of the local press. Combines law, tax policy and other instruments are available to the federal cabinet if it wishes to encourage the presence of autonomous media outlets at the local level.

## RECOMMENDATIONS

(a) We recommend a system of compulsory or statutory licensing for cable rediffusion television broadcasts whereby royalties from cable systems would be determined as a percentage of gross revenue. This percentage should be substantial (initially, perhaps 20 percent of gross revenue)<sup>1</sup> and should be adjusted each year by an administrative tribunal or appeal board so that the bulk of earnings surplus to the capital attraction requirements of the industry flow to the broadcasting and program production sectors. The percent of revenues could be based on a sliding scale according to a formula incorporating the size of a cable system and its penetration. In view of the monopoly character of the cable industry, there is little justification for the retention by cable of funds surplus to capital attraction. And, given the economic use made of television signals by cable, we believe that cable should contribute to the objectives outlined in the *Broadcasting Act*.

(b) We recommend that royalties from each cable system be distributed to non-commercial broadcasters and to independent producers whose programs are diffused by non-commercial broadcasters according to the following point system. Each broadcaster would be credited with one (1) point for each hour of **internally** produced and unsponsored programming which is rediffused by a given cable system. Each broadcaster would be credited with three (3) points for each hour of **independently** produced and unsponsored programming which is rediffused by a given cable system. Each independent producer would be credited with seven (7) points for each hour of unsponsored programming on non-commercial television which is rediffused by a given cable system.

At monthly intervals, the total copyright royalties owed by each cable system as calculated as a percent of gross revenues would be distributed to qualifying broadcasters and independent producers. Canadian and

foreign (i.e. U.S.) non-commercial broadcasters and Canadian and foreign (i.e. U.S. and others) independent producers would receive royalties from each cable system in direct proportion to the points earned with respect to the given cable system.

Suppose a cable system earned \$100,000 a month in gross revenues and the copyright liability percentage were set at 20 percent. Total copyright payments would accordingly be \$20,000. Suppose the cable system retransmitted the signals of three non-commercial broadcasters, who provided 100 hours of commercial-free, in house programming and an additional 4 hours of commercial-free independent productions. The broadcasters would earn  $(100 \text{ hrs.} \times 1 \text{ pt.}) + (4 \text{ hrs.} \times 3 \text{ pts.}) = 112 \text{ points}$ . The independent producers would earn  $(4 \text{ hrs.} \times 7 \text{ points}) = 28 \text{ points}$ . Together, broadcasters and independent producers would earn a grand total of 140 points with respect to that cable system in that month. The revenues per point become  $\$20,000/140 = \$142.86$ . Revenues accruing to the broadcasters would be  $(112 \text{ pts.} \times \$142.86) = \$16,000.32$ . Revenues to the independent producers would be  $(28 \text{ pts.} \times \$142.86) = \$4000.08$ .

It is reasonable to expect that musicians, actors, writers and other creative elements would exert a claim on these funds in negotiating with broadcasters and producers. Assigning seven points to independent producers and three points to non-commercial broadcasters for each hour of independently produced, commercial-free programming has the effect of encouraging the use of independent productions. If Canadian cable system rediffused the signals of only one non-commercial broadcaster, the proposed point system would not provide an incentive for the use of independent productions. However, virtually all cable systems carry at least two non-commercial broadcasters, and more rather than fewer such broadcasters are likely to be carried in the future. When cable systems rediffuse the programs of more than one non-commercial broadcaster, the proposed point system offers a tangible financial incentive for using independent productions.

- (c) With respect to administrative details, we recommend that independent producers be rigorously defined as independent of broadcasters. Hence, even if a producer constituted a separate corporate entity, it would not be treated as independent if this entity were owned by a broadcaster.
- (d) We recommend that a revised **Copyright Act** provide for the principle that foreign broadcasts and independent producers in respect of these foreign broadcasts be encompassed in the statutory licensing scheme proposed above. However, we recommend that cable systems only become functionally liable for royalties to broadcasters and independent producers located in foreign jurisdictions after the federal government has satisfied itself that Canadian broadcasting interests have been treated equitably in the given foreign jurisdiction and after an appropriate order-in-council has been issued. With respect to the United States, cable systems would not be obliged to pay royalties for the retransmission of PBS broadcasts and for the retransmission of independent U.S. productions on Canadian or American non-commercial broadcasts until the federal government was satisfied with the treatment of Canadian interests under the U.S. copyright licensing scheme. In a similar vein, royalties would not be transferred to independent British producers whose programs are carried on rediffused non-commercial broadcasts until the federal government was satisfied with the treatment of Canadian interests under British jurisdiction. The federal government might consider offering rediffusion benefits in exchange for a less unfavourable treatment of Canadian program producers under the British quota system.
- (e) We recommend that the **Copyright Act** enforce contractual arrangements regarding program exclusivity against both unauthorized cable importation of distant signals and broadcast rediffusion of satellite signals. Cable companies would be required either to delete distant stations during time periods when such stations carried

programming for which a local station had acquired an exclusive right, or at the cable company's option to purchase the right to rediffuse this program from the local rights' holder. Likewise, local broadcasters would be precluded from rediffusing cable originated programming being distributed by satellite without authorization.

(f) We recommend that cable copyright liability be invoked in all cases where commercial deletion and substitution takes place, but that commercial deletion and substitution be authorized (by the CRTC) only for Canadian programs broadcast on Canadian stations.

#### IMPLICATIONS OF RECOMMENDATIONS

It will be noted that we have adopted the recommendations set forth by both the Economic Council of Canada and the Consultative Committee on the Implications of Telecommunications for Canadian Sovereignty (Clyne Committee). The Economic Council recommended invocation of cable copyright liability for rediffusion of non-commercial television programs and of commercially sponsored programs subject to commercial deletion and substitution. The Clyne Committee recommended invocation of exclusive rights against cable importation of distant signals.

We assess the implications of the foregoing recommendations from the standpoints of Canadian and American non-commercial broadcasters, independent producers, Canadian commercial broadcasters, cable companies, viewers, and the objectives of the **Broadcasting Act**.

**Non-commercial broadcasters.** This group is favoured by the proposals in a number of ways. First, it benefits directly from cable television copyright payments, each station directly in proportion to the ratio of non-commercial programing rediffused by cable. (Under our proposal, non-sponsored pay television programing could qualify also, but our main intention is that copyright payments be made for non-commercial programming distributed free of direct charge to subscribers).

Furthermore, insofar as copyright liability is invoked for commercial deletion and substitutions, non-commercial broadcasters would benefit from the portions of their schedules containing commercials to the extent that copyright payments exceeded the commercial value of distant audiences.

Under this proposal, the CBC is given added incentive to reduce its commercial activities<sup>2</sup> and new non-commercial networks (such as provincial communications broadcasting) can be expected to receive stimulation.

**Independent producers.** This group will gain from the proposal to the extent that such producers are able to receive distribution on non-commercial stations and networks. We do not recommend that independent productions that are commercially sponsored receive any copyright payments, since (a) Canadian independent productions carried by Canadian commercial broadcasters are likely to be of low complexity and low quality due to the system of incentives characterizing commercial television in Canada, and (b) the bulk of the funds would accrue to American producers whose programs are carried on American and Canadian stations.

**Canadian commercial broadcasters.** This group gains from our proposals in a number of ways. First, insofar as the CBC is given added incentive to reduce its commercial content, advertising revenues to commercial broadcasters can be expected to rise.

Secondly, insofar as we recommend enforcement of program exclusivity against cable television's signal importation, commercial broadcasters will benefit.

Thirdly, copyright protection against commercial deletion and substitution should be welcomed by commercial broadcasters. If such deletion and substitution were applied to their Canadian originations, they would stand to gain financially from the situation in which no deletions and substitutions take place.

**Viewers.** Canadian viewers stand to gain both from the decrease in commercial activity of the CBC and from the increase in independent productions made available.

The possible deletion of distant signals in order to protect program exclusivity rights could prove to be annoying, assuming cable companies fail to negotiate the rights to rediffuse such programs at those times. Furthermore, some increase in cable subscription rates is to be contemplated, although the consultants feel strongly that much revenue can be diverted from cable companies into program production in the absence of rate increases.

**Cable companies.** Since cable companies are the source of revenues, they may object to some of these proposals. Insofar as cable television is enfranchised on a monopoly basis, one would ordinarily expect public utility-style regulation to have been invoked, with the accompanying complications regarding rate hearings, supervision of construction programs, and so forth. Such has not been the case. We propose instead that cable copyright liability be invoked. In this light, the cable industry may well perceive that it is getting good treatment compared to the alternative.

Furthermore, the cable industry should be gratified that our recommendations regarding program exclusivity will pre-empt unauthorized use of their pay-TV signals and other programming. In recompense for this, it seems only just that cable be required to reciprocate by honouring the program exclusivity claims of traditional broadcasters.

Finally, through our commercial deletion and substitution suggestions, cable companies gain the opportunity to seek additional revenues by selling local advertisements within programs of distant stations, provided they contract with the distant stations to do so.

**Broadcasting Act.** We consider the foregoing recommendations to be beneficial from the point of view of the aims of the **Broadcasting Act**. First the proposals lend added stimulus to public broadcasting in Canada. Public broadcasting remains the most effective way of pursuing the nation-building objectives of the **Act**.

Secondly, the proposals create a stimulus for the independent program production industry. This goal, while not articulated explicitly in the **Broadcasting Act**, is known to have been accepted by policy-makers in the Canadian government.

Thirdly, for reasons noted above, the proposals strengthen the financial resources of the private sector of Canadian broadcasting, protecting programming rights which at the same time opening up new financial opportunities. This is achieved without unduly weakening the cable television industry, and indeed, as compared to the policy alternative of public utility-style regulation (as recommended by the Clyne Committee) our proposals may be favoured by that industry.

**Other factors.** Our proposals seem to be in accord with long standing government policies respecting cultural industries generally (see Chapter 5); to be promotive of international harmony (see Chapter 6); and to be administratively simple. (Chapter 7).

#### A PARTING REMARK

Our study was commissioned by the Department of Communications to evaluate the pros and cons of the Keyes-Brunet proposal for a rediffusion right in Canadian broadcasts. The Keyes-Brunet report, *Copyright in Canada*, goes well beyond cable rediffusion issues in its survey of copyright. Their report is of singular importance as a source of information and recommendations for copyright policy, and we are convinced that the Government of Canada is advised to give full consideration to many of their recommendations. Nonetheless, the consultants have found that it would be undesirable for the Government to implement the specific recommendations of Keyes-Brunet in the area of cable copyright liability for broadcast rediffusion. We have reached this conclusion for a number of reasons.

The distinguishing characteristic of Keyes-Brunet in this area is that, by creating a right in Canadian broadcasts, all copyright payments can be retained in Canada without violating the letter of international treaties. This distinguishing

characteristic, however, may lead to international difficulties, even while doing little in improving the performance of Canadian broadcasting. Moreover, it would go part way in violating an historic principle of Canadian communications policy, namely the public property nature of radio frequencies.

On the other hand, our proposals are in accord with both the letter and the spirit of international copyright conventions since we advocate non-discrimination as to nationality in broadcasts. Our proposals provide a direct stimulus to the Canadian independent production industry. They recognize the disparities in goals and performance of Canadian public and private broadcasters. They are easy to administer. They maintain in law the principle that radio frequencies are public property.

Broadcasting practice in Canada at the present time stands in strong contrast to the idealistic goals proclaimed in the **Broadcasting Act**, to wit:

Broadcasting in Canada should safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.

We believe the suggestions put forth above would help resolve the conflict between intent and practice.

## NOTES

1. It was noted in Chapter 4 (table 4) that private sector television broadcasters spend over 40 percent of revenue on programming while the CBC devotes 80 percent of revenue to programming. In this light it does not seem unreasonable to require cable companies to contribute 20 percent of gross revenue to program development. In the absence of television production, they would receive no revenue at all. Chapter 4 also estimated the extent to which revenues accruing to the cable industry have been and are likely to remain over and above the level required for capital attraction. We recommend that the cable industry contribute to public purposes through copyright liability instead of through public utility-style regulation.
2. Since cable systems rediffuse non-commercial programs originating with entities other than the CBC (such as TV Ontario and PBS), the CBC would have incentive to increase its proportion of non-commercial programs in order to attain a larger proportion of the copyright "pot".

## APPENDIX I

# Efficiency and the Allocation of Property Rights

*by Robert E. Babe*

In Chapter 2 we noted that the criterion of economic efficiency provides no guidance whatsoever as to the optimal allocation of property rights. However, some fairly sophisticated economic theories have been constructed which might be seen as countering this statement. This appendix, therefore, explores the issue in greater depth.

It has been held by classical and neoclassical economists since the time of Adam Smith that the pursuit of self-interest by individuals, as facilitated by the institutions of private property and exchange, leads to the material well-being of society as a whole; through specialization, or the "division of labour", the output of society is maximized and, through exchange, these outputs flow to their most valued uses. Each producer produces more of his specialized output than he wished to himself consume in the knowledge that he can exchange his product for the output of others specialized in different occupations; and the expertise entailed in such specialization maximizes the 'wealth of nations'.

The foregoing doctrine in and of itself gives no indication, however, as to which distribution of property rights will maximize the wealth of nations. As noted previously, property

rights can seldom be exclusive due to the mutual interdependency of claims. It was this realization that spawned the literature on "externalities". Externalities are social costs and social benefits not included in the calculus of the profit maximizing firm in determining its level of output, and are of two types: public goods and ownership externalities. We shall consider each in turn.

**Public goods.** Markets, or exchanges of private property, are said to be ineffective in promoting the wealth of nations in the case of public goods. Public goods, also termed social wants, are defined as those goods, services or wants (1) for which it is impossible or costly to exclude from benefiting those who choose not to pay, and/or (2) for which the use or consumption of the good by one does not subtract from, and may even add to, the use or consumption by others.<sup>2</sup> The two definitions just given are closely related but are not synonymous.

The difficulty inherent in using markets in cases where use or consumption by one does not subtract from use by another (eg. telephone switching centres in off-peak hours; transportation facilities with excess capacity; television broadcasting signals) is that there are opposing criteria by which to allocate. On the one hand, it is inefficient to exclude non-payers since there is little or no cost associated with further use of the facilities (up to the point of capacity) and such non-payers would obtain benefits therefrom. On the other hand, in the absence of monetary reward, the producer will have no incentive to provide the goods, services or facilities in the first place or to extend their supply. There is no unequivocal market solution to this paradox.<sup>3</sup>

In those other instances where it is prohibitively expensive or impossible to exclude non-payers from benefiting (definition 1) we have "pure" public goods. Everyone benefits from national defence, sanitation, social order and so forth. To charge only those willing to make known voluntarily their demand for such goods, services, conditions or facilities would lead to undersupply. Such goods must be generally supplied by society itself and funded through taxes. It becomes problematic,

however, as to devising criteria by which to judge the quantities that should be supplied.

**Ownership externalities.** These arise when there is interdependency among proprietary claims. The damage inflicted on a farmer's crop from engine sparks is a cost that the railroad will not consider in determining its level of output, unless it is made liable for such damage through law (that is, an explicit restriction on its proprietary claims). Similarly, the damage a cable television system may (or may not) inflict on over-the-air broadcasters through the importation of distant signals is not a factor it will consider in determining the number of signals it will import, unless it is made liable for such damage through law. Cancer causing agents in the work place, acid rain and so forth are other pertinent examples.

It was Ronald Coase who demonstrated, however, that in the absence of transactions costs (that is, the costs associated with contracting), and under the assumption that the distribution of wealth does not affect resource use, the initial apportionment of property rights (whether to the farmer or the railroad, whether to the television broadcaster or to the cable company) will not affect what use ultimately prevails.<sup>4</sup> If the legal right is vested with the railroad, the farmer is at liberty to contract with the railroad to control the emission of sparks by offering it a sum of money equal to or less than the damage he experiences from uncontrolled emission of sparks. Likewise, if the right is vested initially with the farmer, the railroad would have incentive to compensate the farmer for the damage it wishes to inflict on him, in order to attain this right, provided this is the least cost solution for the railway. In either case, "the efficient, or value-maximizing, accommodation of the conflict [it is asserted] will be chosen whichever party is granted the legal right to exclude interference by the other."<sup>5</sup>

Despite such soothing reassurance to the contrary, however, the initial assignment of property rights is indeed important. First, transaction costs may be high, precluding contracting among the affected parties, thereby causing the externalities to persist. For example, there is a high cost in contracting with a multitude of rights' holders. "In the presence of heavy

transactions costs, exclusive rights, whether to pollute or to be free from pollution, are likely to promote inefficiency.<sup>6</sup> Furthermore, for transactions to take place, there must exist a certain amount of knowledge on the part of both parties. Such is not always the case. Workers who contract cancer from the work environment may not become aware of their plight until 20 years after they are first employed.

But more fundamentally, the assignment of rights will affect what is produced and society's valuation of final outputs. For example, a paper mill not liable for pollution may spew mercury into the water and in the process endanger the health and lives of native fishermen; if made liable for this pollution, the health of the fisherman may be protected but the factory may go out of business and reduce employment in the process.

Therefore, the notions of efficiency and wealth maximization take on meaning only within the context of a given distribution of income and system of property. But, such being the case, economists who beg the question (as they must) as to what constitutes the "best" distribution of income and property become constrained in making objective policy recommendations since all recommendations will affect the distribution of income and property. It can be seen, then, that the whole system of theoretical economics takes on an air of indeterminacy and circularity; it is built on a cloud of mist. There are many mixes of final outputs that would be "efficient" and "maximize" wealth, each associated with a different income distribution and different system of relative property rights. It is clear that the distribution of relative rights today helps determine the shape of society tomorrow. Property does more than give title to an income stream. It helps determine what men shall acquire. Given a different distribution of income, different things would be acquired. In other words, society's valuation of its wealth will depend upon the distribution that exists, and the distribution that exists will determine (in part) the components of society's wealth.

It was the mathematician Kurt Godel who proved that no mathematical system is self-sufficient onto itself. Godel's Incompleteness Theorem states that "all consistent axiomatic

formulations of number theory include undecidable propositions;<sup>7</sup> that is, in order to prove certain axioms in a consistent mathematical system, one is forced to step outside or enlarge the system, a never-ending process.

Need we be surprised, then, that the economic system is also circular and hence indeterminant? In order to make decisions respecting the relative rights that should exist in our economy, it is necessary to try to "step out of" the economy for the criteria. It is then unambiguously clear that ultimately economic "science" rests on highly subjective judgements. While it is correct to say that property is the means by which society pursues its ends or by which some of the members of society pursue some of their ends, these very ends themselves are in part dependent upon the system of property. Ultimately, political and moral choices must be made, but these will probably be influenced to greater or lesser degrees by the existing economic order.

## NOTES

1. See E.J. Mishan, "The Postwar Literature on Externalities: An Interpretative Essay," *Journal of Economic Literature*, IX (March, 1971) 1, pp. 1-28.
2. See Richard Musgrave, *The Theory of Public Finance: A Study in Political Economy*, (New York: McGraw-Hill, 1959); and C.E. Ferguson, *Microeconomical Theory*, 3rd ed., (Homewood: Irwin, 1972) p. 499.
3. See Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, Vol. 1, *Principles*, (New York: Wiley, 1970), Chapter 4; also Jora R. Minasian, "Television Pricing and the Theory of Public Goods" and Paul A. Samuelson, "Public Goods and Subscription TV: Correction of the Record," *Journal of Law and Economics*, VII (October, 1964).
4. Ronald Coase, "The Problem of Social Cost", *Journal of Law and Economics* 3 (1960) 3.
5. Richard A. Posner, *Economic Analysis of Law*, p. 17.
6. *Ibid.*, p. 25
7. Douglas R. Hofstadter, *Gödel, Escher, Bach: An External Golden Braid*, (New York: Basic Books, 1979), p. 17. See also Jacob Bronowski, *The Origins of Knowledge and Imagination* (New Haven: Yale University Press, 1978), pp. 67-89.

## APPENDIX II

# *An Analysis of Copyright Obligations for Cable Television: Pros and Cons*

*by Robert E. Babe*

### INTRODUCTION

It is prescribed in the terms of reference for this study for the consultants to address the paper by S.J. Liebowitz entitled **Copyright Obligations for Cable Television: Pros and Cons**<sup>1</sup>, that study being one of a series of papers commissioned by the Research and International Affairs Branch of the Department of Consumer and Corporate Affairs as input into the process of revising the **Copyright Act**.

At the culmination of his analysis, Prof. Liebowitz arrived at the following public policy conclusion pertaining to the desirability of invoking copyright liability for cable television rediffusion of broadcasts:

Our conclusion is that Cable has influenced the transmission mechanism in such a way that advertising rates have gone up and therefore there is no need to impose copyright liability on Cable television owners... There is no justification for imposition of copyright payment on Cable systems.<sup>2</sup>

In this Appendix we develop our reasons for disputing the policy conclusion quoted above. We find that the foregoing conclusion depends both upon a number of ideological assumptions which the present authors do not share and also upon a number of technical assumptions which may not be valid. Before developing these points, however, we present a brief summary of the Liebowitz study.

#### SUMMARY OF THE STUDY

It is Professor Liebowitz's position that cable copyright liability is required if and only if cable television decreases revenues in the North American context by adversely affecting the pre-existing link between audience size and advertising revenues. Broadcasting revenues bear some direct relation to audience size. The existence of cable television could conceivably change that relationship. If cable changes the relationship in such a way that an audience of a given size is worth less to a broadcaster, then and only then (it is held) should cable copyright liability be introduced. While it is agreed that cable could adversely affect broadcasting revenues in other ways, such other effects (it is held) are not of importance as regards copyright.<sup>3</sup>

The author suggests four ways in which cable television could conceivably affect the link between audience size and broadcasting revenues: market fragmentation; strengthening larger and weakening smaller stations; changing directly viewing habits; and audience segmentation. We summarize now these possible effects.<sup>4</sup>

Market fragmentation occurs when local viewers opt for distant signals imported by cable. If local audiences are valued more highly by advertisers than are distant audiences, cable could cause a deterioration in the audience size-advertising revenue link by causing a decline in local audiences, even given an equivalent gain in distant audiences.<sup>5</sup>

Secondly, if the relationship between audience size and advertising revenues is non-linear, then advertising revenues

could decline if larger stations gain audience from smaller stations due to cable importation of signals.<sup>6</sup>

Thirdly, cable television, by making available increased channel choice could cause total viewer time spent watching television to increase, in which case cable will increase broadcast revenues.<sup>7</sup>

Finally, by segmenting audiences among specialized program types (due to greater diversity in program offerings), cable could also segment audiences as to advertising messages, causing a closer correspondence between advertisements and the audience for whom such advertisements are "targeted". In this way, cable could increase advertising revenues.<sup>8</sup>

The author then proceeds to test these four hypothesized effects of cable television on the audience size/advertising revenue link by means of an econometric model. As the major dependent variable, the author employs prices charged for advertising time ("rate card") as a proxy for broadcast revenues. As the independent variable, the author employs weekly viewing hours per capita in city, percent of homes using cable in a city, demographic variables pertaining to income and employment and so forth, weekly local viewing man hours, weekly distant viewing man hours, audience segmentation (or Herfindahl index), and others. However, the key independent variable is the Herfindahl Index, defined as "the sum of the squared market shares, when market share for a firm [station] is the percentage of the market output [viewing hours] which that firm supplies."<sup>9</sup>

On the basis of econometric techniques, the author concludes that (a) local audiences are worth more to advertisers than distant audiences; therefore fragmentation of audiences through cable decreases advertising revenues;<sup>10</sup> (b) the relationship between audience size and advertising revenues is not linear, implying that cable could decrease advertising revenues to the extent that large stations gain new audience at the expense of small stations;<sup>11</sup> (c) that cable television increases viewing time, thereby increasing broadcasters' revenues; (d) that cable television increases the effectiveness of television as an advertising medium, thereby increasing broadcasters' revenues; (e) overall, the author concludes:

Our conclusion is that Cable has influenced the transmission mechanism in such a way that advertising rates have gone up and therefore there is no need to impose copyright liability on Cable television owners.<sup>14</sup>

#### ANALYSIS - IDEOLOGICAL ASSUMPTIONS

Professor Liebowitz makes a number of interrelated ideological assumptions concerning both copyright and the role and nature of broadcasting in Canada from which he concludes that copyright liability is required if and only if cable television decreases the link between advertising revenues and television viewing audience size in the North American context.

First, copyright is perceived as being a monopoly right, and is to be resisted unless persuasive arguments can be found to justify it.<sup>15</sup> We have already disputed the claim that copyright is monopoly (see Chapter 4).

Secondly, it is assumed that the present system of television broadcasting in Canada is working well, and that policy action, if required, should be directed only toward maintaining the status quo rather than seeking improvements.<sup>16</sup> In advancing the assumption that the present system is "working fine", the author puts forth two other sub-assumptions; first, little or no value is ascribed to Canadian broadcasting *per se*; second, the advertiser-financed system of broadcasting is assumed to be efficient. We address now each of these sub-assumptions.

That the author is largely unconcerned with the impact of cable on Canadian, as opposed to North American, broadcasters is apparent from the thrust of the study which is addressed to the latter question. Indeed, only three pages of the entire study are devoted to the topic of cable's impact on Canadian broadcasters. Furthermore, the author's statements that

If Canada could reduce its copyright payments to zero (say by eliminating all Canadian broadcasters), it could free ride

entirely on the American coattails; Canadians could still watch television thanks to CATV.<sup>17</sup>

could indicate that the author does not give recognition to the special importance with which broadcasting in Canada is held by policy-makers.

Furthermore, Professor Liebowitz contradicts his own findings regarding the inefficiency of the advertiser-based system of broadcasting by subsequently assuming that "the present system is working fine prior to the introduction of CATV television."<sup>18</sup> The initial argument of his paper is that advertising is a very inefficient way of financing broadcasting.

These assumptions are instrumental in the author's conclusion that no cable television copyright liability should be introduced. It is clear that if one assumes that copyright is inherently undesirable, that no value should be given to Canadian broadcasting *per se*, that the current system of broadcasting is working well, and that government policy should be limited to protecting the *status quo* rather seeking improvements, one could very well conclude that cable copyright liability should be invoked if and only if cable television erodes the revenues of North American broadcasters considered collectively.

On the other hand, if one assumes that copyright is a property right not dissimilar to other property rights and bearing little resemblance to monopoly, that Canadian broadcasting does have value and should be encouraged, that the present system is not working well for reasons discussed in Chapter 3, and the government should direct attention to seeking improvements in the current system rather than simply trying to preserve the *status quo*, one could reasonably take a different position on the desirability of cable copyright liability.

#### ANALYSIS - METHODOLOGICAL ASSUMPTIONS

The author also makes a number of methodological assumptions pertaining to his empirical analysis of the impact of cable television on North American broadcasters. In this section we

will address two of these assumptions: prices (rate card) as a proxy for revenues, and the Herfindahl Index.

**Prices as a Proxy for Revenues.** To analyse the impact of cable television on the financial position of North American broadcasters, the author regresses "rate cards", that is, the list prices of television stations for their inventory of advertising time, against a number of "independent" variables with a view to determining the impact of these independent variables upon prices. This exercise is valid only insofar as list prices constitute good proxies for advertising revenues. To the extent that published list prices constitute poor proxies for broadcasting revenues, the author's analysis will fail to achieve its goal.

Revenues are equal to price times quantity sold. Although the price charged for a Mercedes Benz may be several times the price charged for a Toyota, one should not assume on the basis of this information alone that revenues accruing to the Mercedes Benz company are necessarily several times greater than revenues accruing to the manufacturer of Toyotas.

In the case of television advertising, also, there are a number of reasons for suspecting that list prices may be inadequate as proxies for revenues. First, the use of list prices assumes that there are few deviations from rate cards attributable to quantity discounts or otherwise, or alternatively, that all stations offer like discounts in approximately the same proportion; this assumption would appear to be unrealistic. Furthermore, the use of rate cards in place of revenues assumes that stations have no unsold advertising time, or that all stations have approximately the same amount of unsold advertising time; there is no reason for expecting this assumption to be true. Moreover, the methodology assumes that the full Rate Card, which has different prices for different times through the day, can be suitably indexed in the absence of data pertaining to the amount of time sold; that is an unrealistic assumption and indeed the author does not even try to create such an index but rather employs a simple average of two time periods.

In light of the foregoing problems, some of which the author recognized, Professor Liebowitz undertook to test the adequacy of rate card as a proxy for revenues. His test is not an all-inclusive test, but nonetheless, the fact that it fails to verify the assumption that prices are good proxies for revenues is very noteworthy. It is worthwhile noting his remarks in full:

It is possible to make an estimate of the extent to which these practices reduce advertising rates from the list prices. We have taken three stations and calculated their potential advertising revenues if all their time slots in a week were sold at the list 30-second advertising time. Two of the stations were large (CBLT in Toronto and CFTM in Montreal) and the third station was small (CBCT in Charlottetown). We then divided this largest potential revenue by the number of viewing man-hours per week. The results were 3.5 cents, 4.7 cents, and 4.5 cents for CBLT, CBCT and CFTM respectively. We then divided the total television advertising for 1978 (approximately \$400 million) by the total Canadian man-hours per year and got a result of .87 cents per hour. It is quite obvious that revenues are much lower than their maximum potential.<sup>19</sup>

Nonetheless, he adds, "we will continue to assume that the list rates are indicative of the supply/demand conditions for the individual stations."<sup>20</sup>

**The Herfindahl Index.** The other key variable employed in the regression equations is the H-index which undergoes a series of treatments. The H-index "is defined as the sum of the squared market shares, where market share for a firm is the percentage of the market output [viewing hours] which that firm supplies."<sup>21</sup> It is first introduced as a proxy for market power under the supposition that in highly concentrated markets television stations will be able to set relatively high prices through

collusion, whereas in unconcentrated markets, they will be unable to do so.<sup>22</sup> In such circumstances, one would expect a positive correlation between rate card and H-index.<sup>23</sup>

The regressions reveal, however, a "significant negative" correlation between rate card and H-index,<sup>24</sup> leading the author to believe that "there is obviously some effect other than market power which is being picked up."<sup>25</sup> It is assumed that the H-index is negatively (and significantly) correlated with cable penetration rates.<sup>26</sup>

Since H-index is assumed (and subsequently found) to be negatively correlated with cable penetration rates, and since H-index is also found to be negatively correlated with prices charged for advertising time, therefore it is concluded that cable penetration is positively correlated with list prices (Rate Cards). Since list prices are used as a proxy for revenues, it is concluded that high cable penetration rates are positively correlated with revenues. A causal relationship is then posited between cable penetration rates and broadcasting revenues and it is stated that cable television has served to increase broadcasting revenues.<sup>27</sup>

In the Appendix the H-index "is no longer considered a proxy for Cable penetration, as it is in the original study. It is now merely one of the several effects caused by Cable."<sup>28</sup> The author continues

In particular, it measures both the ability of advertisers to pinpoint viewers according to taste and the likelihood that viewers watch television more intensely when they have a greater choice of programs.<sup>29</sup>

The author regresses Rate Card against H-index and other variables and again discovers that the lower the concentration in a market, the higher are the Rate Cards.<sup>30</sup> Next, H-index (now termed "audience segmentation") is regressed against cable penetration and other variables,<sup>31</sup> and it is discovered that the higher the cable penetration, the greater is audience segmentation (that is, the lower is the concentration ratio).<sup>32</sup>

Once again it is concluded that cable increases broadcasting list prices and hence revenues.

The principal difficulty that the present consultants have with the H-index and the line of reasoning developed therewith is the **ex-post facto** nature of the author's explanation. Normally in employing the "scientific method", one makes an hypothesis, which yields predictions, which are then tested; if the predictions are confirmed empirically, the hypothesis is not rejected. In Prof. Liebowitz's case, an hypothesis was propounded, namely that in highly concentrated markets television stations will collude to set prices; the hypothesis was tested by testing the prediction that prices will be relatively higher in highly concentrated markets, and the hypothesis was rejected since the empirical findings did not support the predictions. So far so good. But next Prof. Liebowitz uses his empirical observation, namely that rate cards are relatively lower in highly concentrated markets, to justify a theory which is never tested. The theory is that cable television enriches broadcasters by segmenting their audiences, thereby making television more effective as an advertising medium. This untested **ex-post facto** hypothesis is the base upon which the author makes his policy conclusion regarding copyright.

We would have more confidence in the hypothesis in the light of the findings of the empirical investigation had some of the implications of the hypothesis been tested subsequently and verified. Such was not done. Therefore, we cannot reject the possibility that the author has simply discovered a correlation between two variables (number of competing stations and rate card) without having detected the causal factor or factors contributing to the correlation. For example, if larger numbers of stations compete in larger markets (such as Montreal, Toronto and Vancouver) and such markets are considered by advertisers to be "must buys", as compared to smaller markets with fewer stations (Peterborough, Moose Jaw and Red Deer) which are not as important for advertising campaigns, the author's explanation regarding the beneficial role of cable television can be dismissed or certainly minimized.<sup>33</sup> There may well be other explanations as well.

### CONCLUSION

The consultants find much merit in the Liebowitz study. The correlation discovered between market concentration and Rate Card is interesting and suggestive of further research; the disaggregation of cable and non-cable viewers into various demographic groupings for purposes of determining differences in viewing habits of cable and non-cable subscribers is also interesting; and we could go on.

Nonetheless, for the reasons discussed in this Appendix, we believe that policy-makers should dismiss the policy recommendation contained in the study and question the reliability of the major empirical conclusion.

## NOTES

1. (Minister of Supply and Services for the Department of Consumer and Corporate Affairs, 1980).
2. *Ibid.*, p. 77 and Executive Summary therein.
3. *Ibid.*, p. 77.
4. Although we dispute the contention that cable copyright liability should be invoked only if cable changes the link between audience size and advertising revenues, we do feel we should point out at this point that none of the foregoing ways set forth by Liebowitz as possibly changing that link necessarily in fact do so. The author's stated intent is to find out whether cable alters the relationship whereby  $R=f(A)$ , where  $R$  is broadcasting revenues,  $A$  is audience size, and  $f$  is "the link". Changes in the magnitudes of  $R$  and  $A$  could take place for any of the four reasons noted without changing the "link", i.e.  $(f)$ . For example, simply because cable fragments audiences does not mean that the value of a distant viewer or the value of a local viewer changes; but surely this is what is implied in addressing the topic of a change in the "link" between revenues and audiences. In this light we also fail to appreciate Prof. Liebowitz's reluctance to investigate the possible differential impact of cable on American and Canadian broadcasters; we fail to see why this is technically a different order of question from the large station - small station topic which Liebowitz does deem to be relevant, for example.

5. *Ibid*, pp. 30, 60.
6. *Ibid*, pp. 31, 63.
7. *Ibid*, pp. 31, 67.
8. *Ibid*, p. 71.
9. *Ibid*, p. 35.
10. *Ibid*, pp. 60-63.
11. *Ibid*, pp. 63-67.
12. *Ibid*, pp. 67-71.
13. *Ibid*, pp. 71-72.
14. *Ibid*, p. 77.
15. *Ibid*, p.1.
16. *Ibid*, p. 27.
17. *Ibid*, p.
18. *Ibid*, p. 7.
19. *Ibid*, pp. 36-37.
20. *Ibid*, p. 37.
21. *Ibid*, p. 35
22. *Ibid*, p. 35 "Relatively high" means high cost per thousand viewers.
23. *Ibid*, p. 35, 39, 41.
24. *Ibid*, p.47.
25. *Ibid*, p. 48.
26. *Ibid*, p. 54.
27. *Ibid*, pp. 53-56.
28. *Ibid*, p. 59.
29. *Ibid*.
30. *Ibid*, pp. 61,71.
31. *Ibid*, p. 71.
32. *Ibid*, p. 71.
33. That there is an institutional basis for supporting this alternative explanation is developed in Robert E. Babe, **Cable Television and Telecommunications in Canada: An Economic Analysis**, pp. 188-212; see also O.J. Firestone, **Broadcast Advertising in Canada: Past and Future Growth** (Ottawa: University of Ottawa Press, 1966).

### APPENDIX III

## Excerpts from the U.S. Copyright Act

*Assembled by Conrad Winn*

### SEC. III LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS

#### (b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CONTROLLED GROUP

Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as a act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public: **Provided**, however, that such secondary transmission is not actionable as an act of infringement if -

- (1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and
- (2) the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and
- (3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

(c) **SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.**

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or

(B) where the cable system has not recorded the notice specified by subsection (d) and deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial

advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: **Provided**, that the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: **And provided further**, that such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

(4) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, if (A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States-Canadian border and is also located south of the forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary transmission is made by a cable system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules, regulations, or authorizations of the Federal Communications Commission.

(d) **COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS. -**

1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall, at least one month before the date of the commencement of

operations of the cable system or within one hundred and eighty days after the enactment of this Act, whichever is later, and thereafter within thirty days after each occasion on which the ownership or control of the signal carriage complement of the cable system changes, record in the Copyright Office a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system, and thereafter, from time to time, such further information as the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), shall prescribe by regulation to carry out the purpose of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted) prescribe by regulation -

(A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted) from time to time prescribe by regulation. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

- (i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);
- (ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;
- (iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;
- (iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent, and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraph (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total \$80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which \$80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than \$3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service providing secondary transmissions of primary broadcast transmitters, are more than \$80,000 but less than \$160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to \$80,000; and (ii) 1 per centum of any gross receipts in excess of \$80,000 but less than \$160,000, regardless of the number of distant signal equivalents, if any.

(3) The Register of Copyrights shall receive all fees deposited under this section and after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on a semi-annual basis, a compilation of all statements of account covering the relevant six-month period provided by clause(2) of this subsection.

(4) The Royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

- (A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and
- (B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2) (A); and
- (C) any such owner whose work was included in nonnetwork programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

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